IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 15 Miscellaneous.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY, STATES MARINE CORPORATION, M. V. NONSUCO INC., LANCASHIRE SHIPPING CO., LTD., SKIBSAKTIESELSKAPET IGADI, A. F. KLAVENESS & CO. A/S, THE DE LA RAMA STEAMSHIP CO., INC., WATERMAN STEAMSHIP CORPORATION, PRINCE LINE, LTD., LYKES BROS. STEAMSHIP CO., INC., AMERICAN PRESIDENT LINES, LTD., SWEDISH EAST ASIATIC CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V., AKTIESELSKAPET IVARANS REDERI, ISTHMIAN STEAMSHIP COMPANY, ELLERMAN & BUCKNALL STEAMSHIP CO., LTD., FEARNLEY & EGER, WILHELMSENS DAMPSKIBSAKTIESELSKAB, DAMPSKIBSSELSKABET AF 1912 A/S, THE BANK LINE, LTD., THE CHINA MUTUAL STEAM NAVIGATION CO., LTD., SILVER LINE, LTD., THE OCEAN STEAMSHIP COMPANY, LTD., A/S BESCO, A/S DAMPSKIBSSELSKABET SVENDBORG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

ON WRIT OF CERTIORARI UNDER 28 U. S. C. SECTION 1651 TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF OF PETITIONERS OTHER THAN ISTHMIAN STEAMSHIP COMPANY.

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INDEX.

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BRIEF OF PETITIONERS OTHER THAN ISTHMIAN STEAMSHIP COMPANY.

Opinion Below.

The opinion of the District Court (R. 97) is reported at 94 F. Supp. 900 (1951).

Jurisdiction.

The order of the District Court was entered on March 7, 1951 (R. 104). The motion for leave to file the petition for writ of certiorari and the petition for the writ of certiorari were filed June 2, 1951. The motion for leave to file the petition for writ of certiorari and the petition for the writ of certiorari were granted on October 8, 1951, 342 U. S. 811 (R. 105).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1651(a), as enacted by Public Law 773, 80th Congress, 2d Session, on the ground that Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C. § 29),[1] confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the Sherman Act, and that the grant of the common law writ of certiorari would be in aid of such exclusive appellate jurisdiction.

Questions Presented.

The complaint invokes the jurisdiction of the District Court under Section 4 of the Sherman Act (15 U. S. C. § 4) (R. 1). It alleges that the petitioner steamship lines, associated together in the petitioner, Far East Conference, pursuant to an agreement approved in 1922 under the provisions of the Shipping Act, 1916, as amended, constituted all but one of the common carrier lines regularly engaged in transportation of property in a trade described in the complaint as the outbound Far East trade (R. 4-5).

The complaint alleges that the petitioners violated Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) by entering into a combination and con-

[1] Generally, statutes are cited only to the United States Code in the text of this brief. The corresponding citation to the Statutes at Large in all cases appear in the foregoing table of citations.

spiracy consisting of "'a continuing agreement and concert of action among the defendants to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of 'contract rates' and higher 'non-contract rates,' the sole consideration for the enjoyment of the lower 'contract rates' being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade.'"

The questions are:

Whether any violation of law so charged does not constitute a violation of the Shipping Act rather than of the Sherman Act.

Whether the District Court had jurisdiction of the subject matter of the cause, or, on the other hand, whether the Federal Maritime Board[2] had exclusive primary jurisdiction over such subject matter.

Whether, in the light of the Shipping Act, the complaint states a claim under the Sherman Act upon which relief can be granted.

Whether the Board, acting under the provisions of

[2] The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order June 10, 1933, No. 6166, § 12, (set out in note under 5 U. S. C. A. § 132) the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by Act of June 29, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. Finally, the functions of the United States Maritime Commission have been transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15 and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. The Federal Maritime Board and its predecessors are referred to in this brief as "the Board".

the Shipping Act was authorized to approve the Conference agreement among the petitioners.

The Pertinent Statutes Involved.

The pertinent sections of the Sherman Act and of the Shipping Act and Section 16 of the Clayton Act, are set forth in Appendix A, hereto attached.

Statement.

(a) Order under review.

This proceeding brings before the Court for review so much of an order of the District Court as denied the motion of the defendants (petitioners) to dismiss the complaint on the ground that it does not allege facts sufficient to state a claim under the Sherman Act and on the further ground that the Court has no jurisdiction over the subject matter.

(b) The complaint.

The complaint predicates the jurisdiction of the District Court solely upon Section 4 of the Sherman Act "in order to prevent and restrain continuing violations by them [the defendants], jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act" (Complaint, Par. 1; R. 1).

The complaint alleges that the corporate defendants are engaged as common carriers by water in the transportation of property in the trade from Atlantic Coast and Gulf of Mexico ports of the United States to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippines. This trade is referred to in the complaint as the "outbound Far East trade" (Complaint, Par. 29; R. 4), a designation which is so apt that we adopt it for the purposes of this brief.

The complaint alleges that the corporate defendants are associated together in the defendant, Far East Conference, under an agreement known as United States Maritime Commission Conference Agreement No. 17, approved on November 14, 1922, under the provisions of Section 15 of the Shipping Act (Complaint, Par. 29; R. 4-5). This agreement between the corporate defendants, as from time to time amended, we shall refer to as the "Far East Conference Agreement." A copy of the Far East Conference Agreement constitutes Exhibit "A" attached to the complaint (R. 8).

Thereupon follow allegations that the membership of the Far East Conference includes all but one of the common carrier shipping lines regularly engaged in the outbound Far East trade, and that the members of the Far East Conference carry "virtually all" of the commercial tonnage transported in that trade (Complaint, Par. 29; R. 5).

After alleging in general terms an unlawful combination and conspiracy in restraint of trade and to create a monopoly in the transportation of property in the outbound Far East trade (Complaint, Par. 31; R. 5), the complaint then states the gist of the charge against these defendants. It states that the combination and conspiracy consist of "a continuing agreement and concert of action among the defendants to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of 'contract rates' and higher 'non-contract rates,' the sole consideration for the enjoyment of the lower 'contract rates' being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade." (Complaint, Par. 32; R. 5-6).

The complaint proceeds to allege that by the combined economic power of the defendants, ex-

erted through "coercive" rate differentials, the defendants have, pursuant to the combination and conspiracy, "induced and compelled" shippers in the outbound Far East trade to enter into freight agreements obliging the shippers to ship by the vessels of the members of the Conference exclusively and have enforced the obligation "by threatening the withdrawal of 'contract rates' and the imposition of oppressive fines and penalties for any deviation by such shippers from the terms of said agreement" (Complaint, Par. 33; R. 6). A copy of the Far East Trade Agreement as in effect on August 15, 1945, is attached to the complaint and marked Exhibit "B" (Complaint, Par. 33; R. 16).

The complaint alleges that the purpose and object of the combination and conspiracy is to drive out and exclude from participation in the outbound Far East trade and to eliminate from competition in that trade any carriers not parties to the combination and conspiracy and thereby to achieve and maintain a monopoly of the transportation of cargo in the trade (Complaint, Par. 34; R. 6).

It further charges (Complaint, Par. 35; R. 6) that, through the exclusive patronage contracts and "the threat of oppressive fines and penalties for deviation therefrom", the defendants have eliminated competition in the outbound Far East trade and have thereby unlawfully restrained and monopolized the foreign trade of the United States in this sector; and (Complaint, Par. 36; R. 6-7) the unlawful combination and conspiracy, attempts to monopolize and monopolization have, as intended by the defendants, prevented other shipping lines from competing with the defendants in this trade.

The prayer for relief (eliminating the language generally requesting an injunction against monopolization, restraints of trade, etc.) prays (Prayer 4; R. 7)

that the exclusive patronage contracts be cancelled and that the defendants be perpetually enjoined from entering into any other contracts or participating in agreements, understandings, practices or arrangements having a tendency to continue or revive the alleged violations of the Sherman Act; and (Prayer 5; R. 7) that defendants be required within 60 days after date of judgment to send a copy of the judgment to each contract shipper together with a notice that his contract has been cancelled.

Pertinent provisions of the Far East Conference Agreement (Exhibit A) and the Far East Trade Agreement which went into effect in 1945 (Exhibit B) will be discussed respectively at pages 39 to 44 and 67 to 68 *infra*.

(c) The answers.

In due course, the petitioner Isthmian Steamship Company served its answers (R. 21, 46) and the petitioners other than Isthmian Steamship Company served their answers (R. 21) and, pursuant to leave granted by the Court, the petitioners filed their respective supplemental answers (R. 80, 88).

(d) The motions.

The respondent, United States, made a motion for judgment on the pleadings (R. 93). The petitioners made their respective cross-motions to dismiss the complaint (R. 72, 74) based generally upon the proposition that the facts alleged in the complaint state a claim, if any, under the Shipping Act and not under the Sherman Act; and that, accordingly, the complaint should be dismissed for the reason that it does not state a claim against the petitioners upon which relief can be granted; but states a claim, if any, of which the District Court has no jurisdiction and of which the Board has exclusive jurisdiction.

(e) Intervention of the Board.

At this juncture, the Board moved for leave to intervene as a defendant (R. 94) and further moved "for an order dismissing the complaint upon the grounds that (1) this Court lacks jurisdiction over the subject matter of this action; and (2) the complaint fails to state a claim upon which relief can be granted." (R. 95).

(f) The order of the District Court.

After hearing argument of counsel and reading the briefs submitted in support of the motions made by all parties, the District Court, on March 7, 1951, entered its order denying all of the motions (R. 104).

The order granting the writ of certiorari herein brings up for review only so much of the order of the Court below as denied petitioners' motions for a dismissal of the complaint.

(g) The opinion of the District Court.

Prior to the entry of the order of the Court below, the presiding District Judge filed his opinion (R. 97).

As we understand it, the denial of petitioners' motions was predicated on several grounds. The first point made in the opinion is that, since the allegations of the complaint charge violations of Sections 1 and 2 of the Sherman Act, the express provisions of Section 4 of that Act require the Court to retain jurisdiction of the case, notwithstanding the provisions of the Shipping Act. The reason put forward by the Court below is that the only exemption from the provisions of the Sherman Act "is granted by a specific provision of the Shipping Act, but even this exemption may not be construed as a restriction on the jurisdiction of this court" (R. 99).

Secondly, the Court stated that, notwithstanding that the Conference agreement, having been approved by the Board, may be within the purview of the statutory exemption, it does not follow that all conduct of the petitioners and the practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act (R. 99).

Thirdly, the Court stated that the specific immunity from the Sherman Act which follows from the approval of a conference agreement under Section 15 of the Shipping Act (46 U. S. C. § 814), does not constitute a limitation on the jurisdiction of the Court. It constitutes merely a legal defense not otherwise available. It does not curtail the authority vested in the Court by the specific provisions of Section 4 of the Sherman Act (R. 100-101).

Finally, the Court predicated its denial of petitioners' motions upon the ground that the United States is not a "person" within the intendment of Section 22 of the Shipping Act (46 U. S. C. § 821). It viewed the opinion of this Court in *United States Navigation Company, Inc.* v. *Cunard Steamship Company, Ltd.*, 284 U. S. 474 (1932)[3] as approving the dismissal of the complaint there on the ground that the private plaintiff had an adequate remedy under the Shipping Act; and distinguished the case at bar from *United States Navigation* on the ground that, since, in the Court's opinion, the United States is not a "person", the United States does not have any remedy except that under the Sherman Act (R. 101-102).

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[3] In the text of this brief all Court opinions are cited only to the official reports. Citations to the unofficial reports, however, appear in the foregoing table of citations.

Specification of Errors to Be Urged.

The District Court erred:

1. In holding that it had jurisdiction of the subject matter of the action.

2. In holding that the subject matter of the action was not within the exclusive primary jurisdiction of the administrative agency established under the Shipping Act.

3. In holding that, notwithstanding the provisions of the Shipping Act, a cause of action under the Sherman Act was alleged.

Summary of Argument.

I. The case law.

(a) The decisions of this Court are persuasive that the questions presented should be answered in favor of the petitioners.

In *United States Navigation*, 284 U. S. 474 (1932), suit was instituted by a competing steamship company against a combined group of the remaining carriers in the trade, for an injunction against violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). All of the wrongs charged against the petitioners in the instant case were charged against the defendant steamship companies in *United States Navigation*. This Court held that the District Court did not have jurisdiction but that the case was one over which the Board had primary jurisdiction. The Court specifically saved the question whether the same rule would apply if the Government were the plaintiff. Nevertheless, the reasoning of the opinion requires that the same rule should be applied.

This Court proceeded upon the grounds (i) that the Shipping Act had set up a comprehensive set of standards of right and wrong for the steamship industry;

that, to the extent that the acts of the defendants ran afoul of some of the interdictions of the Shipping Act, the remedies prescribed by the Shipping Act supersede those prescribed by the Sherman Act; (ii) that the argument to the effect that a conference agreement providing for the contract system[4] cannot legally be approved, is unsound; and (iii) that the issues presented in such controversy, particularly with respect to the legality of a contract system in any set of circumstances, involve intricate questions of steamship economics and history which are generally unfamiliar to a judicial tribunal but well understood by the Board and with which the Board is, consequently, better able to deal.

In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297 (1937), the Court laid down the criteria to be applied when the legality of a contract system requires determination. An examination of these determinative factors and this Court's action with respect thereto, is persuasive that the Congress has vested in the Board the exclusive primary jurisdiction over this question. In a footnote to the opinion in *Swayne & Hoyt id.* at 307, this Court expressed the view that the contract system is not illegal *per se.*

The determinations of this Court have also indicated that, in principle, the same rule should be applied in such situations, irrespective of whether the Government or a private litigant is the plaintiff.

In *United States* v. *Pacific & Arctic Railway & Navigation Co.,* 228 U. S. 87 (1913), this Court determined that, even when the United States prosecutes, on the criminal side, a cause which involves issues

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[4] The practice of promulgating and making charges in accordance with a tariff specifying two levels of rates, the lower of which is available only to shippers who sign contracts to confine their shipments exclusively to vessels of the conference lines, is referred to in this brief as the "contract system".

falling within the competence of the Interstate Commerce Commission, primary resort to that agency is necessary.

In *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383, 412 (1912); 236 U. S. 194, 207-209 (1915); and *Terminal Railroad Association of St. Louis* v. *United States*, 266 U. S. 17, 29-31 (1924), this Court rejected the repeated efforts by the Attorney General to persuade it to include within its decrees, determinations which were within the competence of the Interstate Commerce Commission. This Court approved decrees limited to matters with which the Commission was not empowered to deal.

(b) The case at bar requires more imperatively than *United States Navigation* the application of the rule announced in that case because here the complaint alleges the approval by the Board of the Far East Conference Agreement (R. 4-5).

Petitioners urge that the approval of that agreement exempts them from prosecution of a suit for violation of the Sherman Act for either of two reasons: (i) the agreement itself is sufficiently broad to warrant the petitioners in the maintenance of the contract system; and if any doubt should exist with respect to its scope and coverage, the interpretation placed upon the agreement by the Board has been such as to give it a meaning which brings the maintenance of a contract system within its scope; and (ii) if, perchance, this Court should, notwithstanding administrative interpretation, deem the agreement insufficiently specific, a court should not issue an injunction which can be obviated by the subsequent approval by the Board of an amendment to the Conference Agreement so as to add thereto a clause which would unequivocally authorize the maintenance of a contract system. A court of equity will not enter a decree which would thus constitute what this Court has re-

ferred to as an idle gesture. *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439, 461 (1945).

(c) The practical construction of the Shipping Act sustains petitioners' position.

The decisions of the Board in cases involving the contract system have determined that the system is not illegal *per se*; but that the legality in each instance must be determined by weighing the necessity for stability of rates and regularity of service against the desirability of free competition. In performing this function, the Board has, when required, legislatively prescribed proper conduct for the Conference, as a condition of the continued maintenance of the contract system. The interpretation given by the Board during the history of the Shipping Act is entitled to great weight in determining whether or not the contract system is illegal *per se*. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915) and *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524-525 (1940).

II. The statutory law.

(a) A comparative analysis of the Sherman Act and the Shipping Act is persuasive that the purpose of the Congress was to excise the business of common carriage by water in foreign commerce from the body of our economy which had been made subject to the Sherman Act.

The purpose and philosophy of the Sherman Act is that the general welfare of the community is best served when all units in a field of industry engage in unrestrained competition. The Shipping Act, on the other hand, contemplates the service of the public welfare by an entirely different political concept, *i.e.*, the agreement and cooperation among common carriers for the purpose, among others, of "controlling, regulating, preventing, or destroying competition" (Shipping Act, Section 15) which, but for the

Shipping Act itself, would have flown in the face of the basic antitrust theory. Section 15 (46 U. S. C. § 814) itself permits the members of a conference to enter into agreements which affect the business of carriers who are unwilling to join the conference.

Section 15, however, does not give to ocean carriers the untrammeled right to combine and to function as they might see fit. The validity of new conferences is made subject to advance Board approval of their basic agreements, and the legality of all conferences, old and new, can at any time be brought to an end by Board disapproval of their agreements (Shipping Act, Section 15; 46 U. S. C. § 814). *Public regulation of combined activity was thus substituted for free competition.* The privileges which may be exercised by such conference members are, moreover, strictly circumscribed by specific sections of the Shipping Act which prohibit, on pain of heavy penalties or onerous fines or imprisonment or both, conduct deemed by the Congress to be hostile to the public interest.

The Board is given plenary power, either on its own motion or on complaint, to investigate any violation of the Act *and to enter the appropriate remedial order* (Shipping Act, Section 22; 46 U. S. C. § 821) which, in turn, is enforceable by Court injunction (Shipping Act, Section 29; 46 U. S. C. § 828) or judgment (Shipping Act, Section 30; 46 U. S. C. § 829).

While, doubtless, members of a conference would be amenable to Sherman Act prosecution if they should conspire with industrial or commercial shippers so as to restrain trade or to produce a monopoly in the fields of commerce or industry in which such shippers might be engaged (*Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936)), it is clear that any action by a conference or its members which

may be unfairly or unduly prejudicial to the rights of shippers or of a competitor in the field of shipping, constitutes a violation of the Shipping Act and not of the Sherman Act, with the purposes of which it is diametrically in conflict.

(b) The Shipping Act does not prohibit the Board's approval of agreements which permit the maintenance of the contract system.

Petitioners accept *arguendo* the Attorney General's contention that the contract system will destroy outside competition. Section 15 of the Shipping Act permits the Board to approve agreements "preventing, or destroying competition". The Attorney General has contended that such agreements may prevent or destroy competition only among the parties to the agreement. Section 15 is barren of any language to support this contention; but, on the other hand, it contains internal evidence that such was not the purpose of the enactment. This same section gives the Board power to disapprove, cancel or modify any agreement, whether or not previously approved by it, which it finds to be unjustly discriminatory as between carriers. In view of the unlikelihood that a carrier would become a party to an agreement which discriminates against it, the carrier against whom the Congress contemplated that unjust discrimination might be practiced is a carrier not a party to the agreement.

Statutory evidence for this contention is likewise found in Section 14 of the Shipping Act (46 U. S. C. § 812). Under subdivisions First and Second, conferences as well as individual carriers are prohibited from paying deferred rebates and from using fighting ships. If Section 15 did not contemplate that approved conferences might adopt restrictive competitive methods against non-conference lines, the prohibitions of Section 14, subdivisions First and Second, against action by carriers in combination, would be surplusage.

Nor is there any force to the argument that Section 14, subdivision Third, constitutes a prohibition against the contract system. First, although subdivisions First and Second proscribe acts by carriers under agreements, subdivision Third is silent on this score. Hence subdivision Third applies to actions by individual carriers only. Secondly, subdivision First of Section 14 prohibits *deferred* rebates and is at great pains to define the nature of the deferment. Subdivision Second is equally explicit in defining the meaning of the term "fighting ship". Subdivision Third does not even mention the contract system. The prohibition against "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * *," can scarcely even, by strained construction, be made to refer to the contract system. This point is rendered doubly apparent when it is considered that subdivision First does not prohibit *all* rebates as a consideration for the shipper's giving all of his shipments to the conference carriers. The rebate is prohibited only if it is *deferred*. Certainly, if the conference may be authorized by Board action to give rebates, currently payable, in exchange for exclusive patronage, a construction of the Act which would prevent the conference carriers from charging the net rate in the first instance, would be anamolous. Thirdly, if subdivision Third be construed to outlaw the contract system, then, *a fortiori*, it would outlaw the deferred rebate system and subdivision First would be mere surplusage.

Finally, it is to be noted that a violation of Section 14 is a misdemeanor punishable by a fine of not more than $25,000 for each offense—the largest cash penalty stipulated in any section of the Act. The section is, therefore, highly penal. If the Attorney General's underlying contention were correct, the penalties and sanctions of the Sherman Act would be piled on those

specifically provided for in Section 14. Therefore, the section should not be held to extend to cases not covered by the express meaning of the words used. *United States* v. *Resnick*, 299 U. S. 207 (1936).

III. Legislative history.

If there should be any doubt whether the language of the Shipping Act supports our contentions, the legislative history of that statute dispels all uncertainty.

The Act was adopted at a time when the Government had been defeated in all anti-trust cases which it had instituted against steamship conferences. An investigation into these conferences had been ordered by House resolutions which are instinct with animosity against the conference system and with determination to uproot them. After a lengthy investigation in which prime considerations of steamship economies were for the first time explored in this country, the Congressional investigating committee reached the conclusion that monopoly and restraint of trade were not the ills which were afflicting the ocean-carrying trade. It reached the conclusion that the real ills to be prevented were destructive rate wars and other predatory practices which are inevitable under a regime of free and unregulated competition in ocean transportation; that such competition cannot be prevented in the absence of a combination among the individual steamship lines; that rate wars are injurious to the carriers, and in the long run result in the elimination of the weak lines and the preservation and, possibly, consolidation of the strong, thus resulting in, and not preventing, a monopoly; that such rate wars and the instability in rates which they represent, place American merchants at a great disadvantage in their rivalry with their foreign competitors, for the reason that such instability deprives the American

merchant of the ability to contract for delivery abroad at specified dates and to quote firm prices for future c.i.f. or c. & f. delivery. Under the foreign laws, the foreign merchant is under no such disability.

The Committee was under no misapprehension, however, that the steamship lines could be permitted to combine with benefit to the public unless they were made subject to regulation by a powerful Governmental agency. The Board was set up with far-reaching power to protect the public interest.

Thus stands out the purpose to substitute regulated combination for the unrestrained competition and to create the Board as the protector of the public interest in this important branch of the national economic life.

With equal clarity the legislative history demonstrates that the Shipping Act should not be construed as rendering the contract system illegal. The recommendations of the legislative Committee specifically contemplate that Section 15 had the purpose of authorizing conference agreements which should affect the competition not alone among the conference members but as well between the conference members and the non-conference lines. The Committee report also demonstrates that the investigation had revealed the employment by conferences of the contract system as well as the employment of deferred rebates and of fighting ships. The indefinite language of Section 14, subdivision Third, can thus not be applied to a very definite competitive practice, *i. e.*, the contract system, of which the Committee had been made aware.

IV. The Court below erred in ruling that the United States has no remedy other than under the Sherman Act.

It follows from what has been said that the Congress set up the Board as the representative of the United States to bring about conformity by ocean carriers to the provisions of the Shipping Act. Section 22 of the

Act (46 U. S. C. § 821) empowers the Board, without prior complaint from anyone, to investigate violations of the Act and to enter orders bringing such violations to an end. The Board has frequently exercised this power.

The ultimate plaintiff in this case, the United States, therefore, does have a remedy, other than a hypothetical one under the Sherman Act, and the public welfare is thus completely protected even if the Attorney General were not empowered to initiate proceedings before the Board. Petitioners contend, however, that he is empowered so to proceed; that the term "person" as used in Section 22, is broad enough to include the sovereign.

V. The freight contract between the Conference and the shipper is not subject to attack under the Sherman Act.

The Attorney General argued below that the contract between the Conference and the shipper is a violation of the Sherman Act, for the reason that Section 15 of the Shipping Act (46 U. S. C. § 814) authorizes the Board to approve only agreements among common carriers or among other persons subject to the Act, or among parties in both such classes. There are two answers to this contention:

First, the complaint is based upon an alleged combination and conspiracy among the petitioners, the essence of which is the dual rate system supported by exclusive patronage contracts with a great number of shippers. The result of this conspiracy is alleged to be the exclusion of other carriers from the outbound Far East trade, and the restraint of trade, and monopoly. The attack is not made upon the contract with the shipper as, in and of itself, constituting a violation of the Sherman Act.

Secondly, the contract with the shipper constitutes only one of the conditions of the tariff providing for dual rates. If the Board has the power to approve the adoption of dual rates and the contract system, it follows that the carriers, under an approved agreement, may legally do all that is necessary in the performance of that agreement, and that contracts with shippers entered into in the course of such performance, are shielded from illegality. *Cf. Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, 476 (1933).

VI. The interpretation of the Shipping Act urged by petitioners would not render that statute unconstitutional.

The Attorney General may here contend that the Shipping Act should not be interpreted as urged by petitioners for the reason that, so interpreted, it would be unconstitutional. That argument proceeds upon the hypothesis that a conference holds the power, by the institution of the contract system, either to exclude an outside line from the trade or to compel it to join the conference. So the argument is that, by petitioners' interpretation, the group of private carriers would be vested by the Congress with the right to issue or withhold certificates of convenience and necessity. The argument proceeds that this result would render the Act unconstitutional in accordance with the principles laid down in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537 (1935).

Petitioners urge that such argument is without force, even conceding, for the purpose of the discussion, that the contract system does have the far-reaching economic effect stated in the hypothesis. The reason is that in *Schechter*, the Congress had laid down no standards by which any Governmental agency could supervise or negate actions of the parties operating under a code; whereas, the Shipping Act abounds with specific directions to the Board to govern its regula-

tion of conferences. This distinction is decisive. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 388, 395-396, 399 (1940).

VII. The cases relied upon by the Attorney General.

The cases relied upon by the Attorney General do not establish the proposition that in antitrust attacks upon parties engaged in a regulated industry, there is one rule when the United States is the plaintiff and another rule when a private litigant is the plaintiff. It is true that under Section 16 of the Clayton Act (15 U. S. C. §26), the United States may, but a private litigant may not, seek injunctive relief against common carriers subject to the Interstate Commerce Act, in respect of any matter subject to the jurisdiction of the Interstate Commerce Commission. Section 16 has not, however, been extended so as to make its proviso applicable to carriers subject to the Shipping Act. Cases according to the United States a remedy denied to private litigants because of the proviso in Section 16, can, therefore, have no application here.

The rule that a shipper may not, under Section 7 of the Sherman Act (15 U. S. C. § 15) sue interstate carriers for treble damages inflicted by illegal combinations (*Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156 (1922)), is not to the contrary. It is predicated upon the proposition that to permit the shipper so to recover might result in giving him an unlawful preference.

Until interstate carriers were permitted to combine under the supervision of the Interstate Commerce Commission for the purposes of rate-making (Reed-Bulwinkle Act, 49 U. S. C. § 5b), combinations of such carriers for that purpose constituted violations of the Sherman Act and injured shippers were accorded the same right as the Government to prosecute a suit in equity to restrain the continuance of such combina-

tions. So much is demonstrated by a comparison of *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439 (1945) with *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897) and *United States* v. *Joint Traffic Association*, 171 U. S. 505 (1898).

Nor is a case applicable where the regulatory statute grants to the administrative agency mere inquisitorial power but no power to hear, determine and finally dispose of the complaint. *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196 (1945).

Further, the Attorney General's position is not sustained by reference to a case in which the conspiracy included persons other than those engaged in the regulated industry or in which the regulatory statute does not, in and of itself, contain a prohibition of the acts complained of. *United States* v. *Borden Co.*, 308 U. S. 188 (1939).

ARGUMENT.

FIRST POINT.

PRECEDENT FAVORS PETITIONERS' CONTENTIONS.

(a) Cases decided by this Court lead to the conclusion that the complaint fails to state a claim under the Sherman Act and that the Court below was without jurisdiction of the cause.

The complaint is predicated solely upon alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). The jurisdiction of the District Court was predicated upon Section 4 of that Act (15 U. S. C. § 4) (R. 1). It is petitioners' position that cases which have been decided by this Court lead by inexorable logic to the conclusion that if the facts alleged in the complaint constitute a violation

of any statute, that statute is the Shipping Act, and not the Sherman Act; and that the wrongs complained of, if existant, are remediable by the Board, which has exclusive primary jurisdiction, and not by the courts.

In *United States Navigation Company, Inc.*, v. *Cunard Steamship Company, Ltd.*, 284 U. S. 474 (1932), the same charges as appear in the complaint herein were made against the lines which were engaged in the trade from United States North Atlantic ports to ports in Great Britain and Ireland. The complaint there also charged violation of the Sherman Act. That the charges in *United States Navigation* were identical with those here, appears in the following language of this Court (*id.* at 479):

> "The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, *the sole consideration being their effect as a coercive measure.* * * *" (Italics supplied.)

United States Navigation was even stronger against the defendants than the case at bar. Here, the complaint alleges that the defendants have an agreement approved by the Board which authorizes their cooperative rate and tariff making (R. 4-5, 10-11). In *United States Navigation* the complaint did not allege that there was any filed and approved conference agreement but alleged that no agreements authorizing the use, by the defendants, of the contract system, or any similar agreements, had been filed with or ap-

proved by the Board (*United States Navigation*, Record, Amend. Bill of Complaint, par. 70). The defendants, without answering, moved to dismiss the complaint for insufficiency and for want of jurisdiction on the part of the Court. The motion was granted in the District Court [39 F. 2d 204 (S. D. N. Y. 1929)], affirmed by the Circuit Court of Appeals [50 F. 2d 83 (2d Cir. 1931)] and unanimously affirmed by this Court. The essence of this Court's decision was its concept that the acts charged were violations of the Shipping Act and that, to the extent that the acts constituted violations of both the Shipping Act and the Sherman Act, the remedy under the Shipping Act had superseded that under the antitrust laws.

The Court after reviewing the provisions of Sections 14, 14(a), 16, 17 and 22 of the Shipping Act [46 U. S. C. §§ 812, 813, 815, 816 and 821] used the following language (284 U. S. at 486-487):

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and *the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.* Compare *Keogh* v. *Chicago & N. W. Ry. Co., supra* at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. * * *
>
> "There is nothing in §15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or 'in any manner providing for an exclusive, preferential, or co-

operative working arrangement,' shall be filed immediately with the board; and that the term 'agreement' shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, 'whether or not previously approved by it,' which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' *But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board as in the case of other violations of the act, is fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion.* Its orders, in that respect, as in other respects, are then, under § 31, *for the first time*, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission." (Italics supplied.)

The plaintiff argued there, as does the Attorney General here, that an agreement authorizing the maintenance of the contract system is illegal and that the Board had no power to approve such an agreement. This Court gave its answer to this argument (*id.* at 487):

"A contention to that effect is clearly out of harmony with the fundamental purposes of the act

> and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." (Italics those of the court.)

Thus was disposed of the argument that the contract system is illegal *per se*.

Lest it be urged that upon the question of legality or illegality this Court did not take into consideration the provisions of Section 14, subdivision Third, of the Shipping Act (46 U. S. C. § 812 Third), we call attention to this Court's review of various sections of that Act and, particularly, to the following sentence (*id.* at 483-484):

> "Section 14 prohibits retaliation by a common carrier by water against any shipper by resort to discriminating or unfair methods because the shipper has patronized another carrier; and § 14a confers power upon the board to determine the question. * * *"

Support in principle for the rule announced in *United States Navigation* is found in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937). There,

after repeated hearings (*Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935); *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936)), the Board had entered an order directing the cancellation of the schedules of tariffs of the Gulf Intercoastal Conference which provided for the maintenance of the contract system. The Board emphasized that the lines in this intercoastal conference were subject to the stabilizing action of the Board under Section 3 of the Intercoastal Shipping Act, 1933 (46 U. S. C. § 845).

The determination by the Board was sustained by this Court on the ground that there was evidence to support the Board's findings. So much appears in 300 U. S. at 304:

> "Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. * * *"

The Court made it quite clear, however, that it did not deem the contract system illegal *per se*. It laid down the criteria which should guide the Board in passing upon the legality or illegality of such systems. A statement of these critical factors carries conviction that in no case should a court be charged with making the initial findings of fact. The following appears in 300 U. S. at 304:

> "In determining whether the present discrimination was undue or unreasonable * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvan-

tages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, * * * [the Board] concluded that this was the real purpose of the contract rate."

The balancing of the advantages mentioned is, we submit, an operation involving the determination of economic and not legal questions.

The Court concluded its opinion by appending thereto a footnote, in which it dealt with the question whether contract systems are illegal *per se*. This footnote would seem to constitute a part of the decision, and not dictum, because the Court might have disposed of the controversy on the ground either that the contract system was outlawed by the Shipping Act or on the ground that the legality in the particular case was a matter to be decided in the first instance by the Board, whose findings, if supported by evidence, would not be set aside. The footnote appears in 300 U. S. at 307. After quoting the definition of deferred rebate which appears in Section 14 of the Shipping Act, it proceeds as follows:

> "The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, *e. g.*, pp.

103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. *Cf. W. T. Rawleigh Co.* v. *Stoomvaart,* 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. *Cf. Eden Mining Co. v. Bluefields Fruit & S. S. Co.,* 1 U. S. S. B. 41."

It is to be observed that in *United States Navigation,* this Court saved the question whether the same rule would apply if the Government were the plaintiff seeking injunctive relief under the Sherman Act. We submit that there is no reason in principle why the rule applied in one case should not be applied in the other. Certainly the statutory provisions of the Shipping Act which were considered and analyzed by the Court in *United States Navigation* (284 U. S. 474, 483-484 (1932)), in their specific inhibitions against proscribed conduct of conferences, supersede, to the extent of their restrictions, the very general language of the Sherman Act to the same extent when the Government, as when a competitor, seeks an injunction. The criteria to determine the validity or invalidity of a particular contract system should not vary, dependent upon the character of the party plaintiff. The power of the Board to dispose of the matter is not less adequate in the one case than in the other.

The need for uniform treatment of this problem, which affects so large a segment of our economic

life, demands that a single agency shall at all times apply the criteria; and that the expert knowledge and experience of a specialized agency should be made available in all cases. The need for a uniform disposition of important questions of transportation policy was one of the principal signposts which led this Court to deny the jurisdiction of the District Courts in cases where the administrative agency was competent to deal with the matter; and that, notwithstanding a statute which specifically gave the courts and the agency concurrent jurisdiction. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). Any other rule would result in uncertainty in the application of the critical tests because of the varying experience in such matters of the judges in the District Courts within whose districts any members of the Conference may be served with process and where the antitrust jurisdictional facts may exist.

Another guide which led to the adoption of the primary jurisdiction rule is that the governance of regulated industries requires legislative rather than judicial action. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *Terminal Railroad Association of St. Louis* v. *United States*, 266 U. S. 17, 30-31 (1924).

In this connection, it is important to note that the complaint here charges the defendants with exerting combined economic power, with charging coercive rate differentials and with imposing oppressive fines and penalties for deviations from the terms of the freight agreement. We submit that such issues are those with which characteristically an administrative body is especially equipped to deal. Conceivably, a proper determination of the case at bar might involve the permission to the Conference to continue the maintenance of the contract system, conditioned upon the revision of the form of conference freight

contract. Such situation arose in *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948), more fully discussed at pp. 46-47, *infra*. It would appear that dictation of new terms for such freight agreement are legislative in character and beyond the competence of a judicial tribunal.

Authority supports, as reason requires, the extension of the rule of *United States Navigation* to the case at bar.

Perhaps the case which most strikingly demonstrates the amenability of the United States, acting by the Attorney General, to the same rules as private litigants in analogous cases is *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87 (1913). The appeal came up on the action of the District Court upon demurrers to an indictment containing six counts, only the first five of which are here material. Counts 1 and 2 of the indictment charged violation of the Sherman Act. Counts 3, 4 and 5 charged violation of the Interstate Commerce Act. As to all of these counts, the District Court held that the United States must first go to the Interstate Commerce Commission for an adjudication. This Court reversed as to Counts 1 and 2 (those under the Sherman Act) and affirmed as to Counts 3, 4 and 5 (those under the Interstate Commerce Act).

The parties charged with the infringement of the Sherman and Interstate Commerce Acts were (a) two steamship companies running from Seattle, Washington, to Skagway, Alaska, (b) the Canadian Pacific Railway Co., which owned a steamship line running from Vancouver, B. C., to Skagway, Alaska, (c) a wharf company at Skagway which owned all of the wharves at that port at which cargoes could be discharged and transshipped over railroads, (d) certain railroad companies which carried cargoes from Skagway a part of the way to Dawson in Alaskan

territory, and (e) a British company which owned that part of the railway in British Columbia, from the point where it left the Alaskan side of the line to the point at which it re-entered the Alaskan side of the line. The companies mentioned in (d) and (e) above were under common ownership and their properties constituted a single line from Skagway in Alaska to Dawson in Alaska.

Counts 1 and 2 (the Sherman Act counts) charged that all of the parties combined in an arrangement which bound the wharf company at Skagway to charge only $1.00 per ton for the handling of cargoes brought in by the steamship companies, parties to the combination, but to charge $2.00 a ton for cargoes brought in by other steamship companies. The arrangement further bound the railroad running partly in the United States territory and partly in the Canadian territory to make through freighting arrangements only with the steamship companies which were parties to the combination, and to charge higher rates for the transportation of cargoes imported on other steamships.

Thus, in the antitrust aspect of the case, the parties were alleged not to be acting voluntarily and freely, as required by their own economic welfare, but to be acting pursuant to an agreement entered into for the purposes of eliminating competition with and securing a monopoly for the steamship company defendants. Of course, before the enactment of the Reed-Bulwinkle Act (49 U. S. C. § 5b) the Interstate Commerce Commission had no power over combinations of carriers to fix rates, regulate competition, and the like.

Based upon these considerations, this Court held that since the rates and agreements were arrived at not by individual action but pursuant to a combination in restraint of trade in steamship transportation, they were illegal under the Sherman Act. In other words,

this was a case of what this Court, at a later date, referred to as a "circumambient conspiracy".[5]

In writing of Counts 1 and 2, the language of this Court in *Pacific & Arctic* was as follows (228 U. S. at 104):

> "The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-trust Law, of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. * * *"

It seems clear, therefore, that in sustaining Counts 1 and 2 of the indictment, this Court was but foreshadowing (a) the pronouncements in *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 161-162 (1922) and in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439 (1945) to the effect that a com-

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[5] In *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936).

bination among carriers to fix reasonable and non-discriminatory rates might still be violative of the Sherman Act, and (b) the rule which applies in the case of a "circumambient conspiracy". In such cases, the Interstate Commerce Commission was powerless to grant relief. Hence it had no jurisdiction, primary or otherwise.

When this Court turned, however, to the third, fourth and fifth counts of the indictment, it gave full force to the application of the primary jurisdiction rule although the action was prosecuted by the United States, acting through the Attorney General; and that, notwithstanding the criminal nature of the proceeding.

The third, fourth and fifth counts of the indictment charged that the railroad in Alaska, by making through freighting arrangements with the defendant steamship companies and refusing to make similar arrangements with the Humboldt Steamship Company, which was not a party to the conspiracy, had acted in a discriminatory manner and had been induced thereunto by certain of the other defendants. Here, where the issues and the parties were within the regulatory ambit of the Interstate Commerce Commission, this Court held that the primary jurisdiction rule was applicable (228 U. S. at 107-108):

> "The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal

remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit.: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal.* We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment." (Italics supplied.)

Further strong support is lent to petitioners' position by the series of cases involving the Terminal Railroad Association of St. Louis. The first two appeals to this Court were in *United States* v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383 (1912), and 236 U. S. 194 (1915), an antitrust suit for injunctive relief. The third appeal came on in a proceeding for contempt of court charged by private litigants against some of the defendants in the earlier two cases. *Terminal Railroad Association of St. Louis* v. *United States,* 266 U. S. 17 (1924). The United States became a party to the third suit when it reached this Court.

The Terminal Railroad Association owned practically all the terminal facilities in St. Louis and the surrounding territory. The stock of the Association

was owned by fourteen of the railroads entering St. Louis. By virtue of the facilities owned by the Association, the controlling railroads had the power to permit or deny to other railroads ingress into and egress from St. Louis.

The Courts found that the controlling railroads denied to other railroads the right to acquire stock in the Terminal Railroad Association and that improper use was made by the owning railroads of the advantages which their ownership gave them. As appears in 224 U. S. at 411-413, when the case reached this Court on the first appeal, the case was remanded to the District Court with directions to enter a decree which had the effect of opening to all railroads entering St. Louis the right to acquire stock in the Terminal Railroad Association on just terms. The decree directed by the Court further provided for equality of treatment to railroads which should not desire to acquire shares in the Association.

In short, all aspects of the general agreement and conspiracy were enjoined. However, this Court was careful to direct that there should be excluded from the decree any matter with which the Interstate Commerce Commission had power to deal. Thus, the Court included in the mandate which was directed, the following item (*id.* at 412):

> "Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."

Upon remand, the District Court entered a decree which provided for the reformation of the Association's contract by the elimination of certain rules. Both the United States and the defendants appealed to this Court. The question before the Court on the second appeal was whether due effect was given to the mandate of the Court resulting from the first appeal.

The United States complained that the Court below had failed to include in its decree a direction for the abolition of an arbitrary which was applied in a preferential manner. This Court rejected the Attorney General's argument that the antitrust decree should impinge upon matters with which the Interstate Commerce Commission was empowered to deal. The entire discussion appearing in 236 U. S. at 207-210 is here relevant. However, the ruling with respect to the view thus urged by the Attorney General is epitomized in the following sentence (*id.* at 207):

> "But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the Act to Regulate Commerce and contrary to the exercise by the state authorities of their power over charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. * * *"

After the decree had been entered in the District Court in conformity with the mandate resulting from the second appeal, some of the railroads entering St. Louis from the west brought proceedings against the railroads entering St. Louis from the east and against the Terminal Association, charging contempt of court in that, among other matters, the eastern railroads were not paying to the Association reasonable transfer charges. The District Court held the eastern railroads in contempt. The eastern railroads then

resorted to this Court. The Attorney General joined in the proceeding on behalf of the western railroads and in support of the finding of contempt. This Court reversed. The reasoning is summarized in the following language (266 U. S. at 31):

> "The Terminal Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission. The original decree does not purport to regulate rates or prescribe divisions of joint rates, or fix liability for such transfer charges. On the other hand, it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission. In the exercise of its powers under existing law, the Commission is untrammeled by the decree and may make and regulate rates on through freight and the divisions thereof. * * *"

It cannot be overemphasized that the *Terminal Railroad Association* litigation involved an antitrust suit prosecuted by the Attorney General on behalf of the United States. Nonetheless, this Court rejected every attempt of the Attorney General to have it impinge, in the slightest degree, upon matters within the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act.

Thus, there is rounded out authority for the dismissal of the complaint below—*United States Navigation* (supported by *Swayne & Hoyt*), which holds that the matters such as here are alleged in the complaint come within the competence of the Board; and *Pacific & Arctic* and *Terminal Railroad Association*, which hold that in actions instituted by the Attorney General, whether or not antitrust in character, the

courts should not adjudicate matters which fall within the competence of the regulatory agency and should not deal with such matters in an antitrust decree.

(b) Because of the approval by the Board of the Far East Conference Agreement, this case calls more imperatively for primary resort to the Board than did *United States Navigation*.

In *United States Navigation* (284 U. S. 474 (1932)), the complaint specifically averred that the alleged agreement among the defendants had not been approved by the Board. The complaint in the case at bar specifically alleges that the Far East Conference Agreement was approved by the Board on November 14, 1922 (Par. 29; R. 4-5). That agreement, by an appropriate construction of its terms, authorizes the petitioners to do the acts of which complaint is here made. Any doubt as to the propriety of this construction is set at rest by the long continued interpretation of the agreement by the Board. If petitioners are right in this view, then, by the specific language of the Shipping Act, Section 15 (46 U. S. C. § 814), this agreement has been "excepted from the provision of the [Sherman] Act * * *."

We need consider only Paragraphs 1, 8 and 9 (R. 8, 10-11) of the basic Far East Conference Agreement. For ready reference we quote the material parts of them:

> "1. All freight or other charges for the transportation of cargo between the aforementioned ports shall be charged and collected by the parties hereto strictly in accordance with the tariff of rates and charges agreed to by the parties.
>
> * * * *
>
> "8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or

the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at not later than 4 P. M. of the day prior to the date of meeting; * * *."

"9. * * * the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof."

Petitioners contend that the language above quoted authorizes them, acting as a conference, to establish and maintain a contract system. Petitioners urge that the dual rates established and the contract form employed, constitute an appropriate part of their tariffs and of the regulations incorporated in the tariffs.

Obviously, no rate for the transportation of property between two termini, taken by itself, has any meaning. In order to give it meaning, the tariff must answer many questions. Some of these questions are: the point at which the carrier shall take possession and the point at which delivery shall be made; the form of packing which must be employed in making the goods ready for transportation; the value which the shipper shall be entitled to recover in case of loss or damage in the absence of an *ad valorem* payment; whether the rate is predicated on the *volume* of patronage (*e. g.*, car load lots); and whether the rate

shall be applied on the basis of weight or measurement.

The right to promulgate the regulations to be complied with by anyone desiring to enjoy a rate is implicit in the right to adopt a tariff. The right granted by the Conference Agreement to fix rates does not limit the rates so fixed to a single rate for each commodity. So long as no provision of the Act is violated, the right to fix rates carries with it the right to fix rates at more than one level. If the rates at the lower level have attached thereto as a condition for the enjoyment thereof the execution by the shipper of a special form of agreement open to all shippers, the provision for, and the form of, such agreement constitute an appropriate function of tariff-making.

That the Board recognized that the contract system is a part of the rate-making function, is indicated in *Rawleigh v. Stoomvaart*, 1 U. S. S. B. 285, 292 (1933):

> "The contract rate practice as a practice is not new, and by implication it must be said to have received approbative attention at the hands of a committee of Congress after a lengthy and painstaking investigation of combinations and practices of carriers by water. It has presently almost universal practical application, being used in multitudinous daily transactions by carriers the world over. Like the method of charging rates upon a weight or measurement basis, and, in interstate trades, the carload-less carload mode of rate making, it is a system of rate application which finds acknowledged adaptability in ocean transportation. An important attribute of it is equality of rate treatment as between large and small shippers. * * *"

The Board has, in adversary proceedings, approved, conditionally or unconditionally, of the conduct of

contract systems by conferences whose basic agreements did not specifically authorize the maintenance of such system. *Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933); *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa*, 1 U. S. M. C. 634 (1937); *Sprague Steamship Agency, Inc.* v. *A/S Ivarans Rederi*, 2 U. S. M. C. 72 (1939) and *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

It is true that in none of the cases last cited does the Board specifically refer to the form of conference agreement there under consideration. An examination of the approved agreements in the archives of the Board, however, demonstrates that the statements above made are correct.

That the Board has never considered the inclusion in a conference agreement of a specific provision authorizing the maintenance of a contract system as being essential, appears from the language of the Board in *Isbrandtsen Company, Inc.* v. *North Atlantic Continental Freight Conference*, 3 F. M. B. 235 (1950) (reversed on other grounds, *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951); here on review in Nos. 134 and 135). The Board stated (3 F. M. B. at 241):

> "Based on the intrepretation [of the Shipping Act, § 14(3)] above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide *either specifically or inferentially* for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system." (Italics supplied.)

The adoption and maintenance by the Far East Conference of the contract system has, in an official Board proceeding to which it was relevant, been recognized as a practice in which the Far East Conference was engaged in its activities under the Far East Conference Agreement. In *Investigation—Section 19*

of Merchant Marine Act, 1920, 1 U. S. S. B. B. 470 (1935), the Board investigated the violent rate wars which had been prevalent due to the activities of non-conference lines, and, at pages 476-481, considered particularly the character of this war and its effect upon the commerce to the Far East. At pages 479 and 480, there appear tables illustrating the downward spiral of rates which had constituted the prime manifestation of the rate war. In Table II (p. 479) and Table III (p. 480) appear columns which bear the caption, "Conference contract rates". With respect thereto the Board said, at page 480:

> "It will be noted that in Tables II and III the rates of the conference are headed 'contract' rates. Prior to the collapse of the Far East Conference in 1931, it had been the practice of the conference to give on some commodities reduced or 'contract' rates to all shippers, large or small, who agreed to give all their business for a period of one year to the conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the conference revived this contract rate system and extended it to practically all commodities. This move by the conference was countered by substantial additional cuts in rates by Ellerman & Bucknall as indicated in Table II."

The Board thereupon proceeded to consider the evils resulting from non-conference cutrate competition in five other trades; and then (*id.* at 490-503) condemned the acts of the non-conference lines and promulgated a rule which was intended to aid in restoring stability.

We submit that the foregoing demonstrates that the Board has, for a period of at least fifteen years, interpreted its order approving the Far East Conference Agreement as being sufficient in scope to justify

the maintenance of the contract system which has been in effect for over twenty years.

The ultimate criterion as to the meaning of an order or regulation promulgated by an administrative agency is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the order or regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414 (1945) and *United States* v. *Eaton*, 169 U. S. 331 (1898).

If the Court should, nevertheless, share the Attorney General's view that the Far East Conference Agreement is not sufficiently specific in its language to justify the Conference in maintaining the contract system, this defect could readily be remedied by Board approval of an amendatory agreement providing for the contract system in so many words. In such matters it has been the practice of the courts not to issue injunctions, the effects of which could be obviated by subsequent administrative action. To issue such an injunction is referred to as "an idle gesture". A recent expression of the judicial attitude on this matter is to be found in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439, 461 (1945), where the following language appears:

> "Moreover, the relief sought from this Court is not an uprooting of established rates. We are not asked for a decree which will be an idle gesture. We are not asked to enjoin what the Commission might later approve or condone. * * *"

(c) Practical construction supports petitioners' contentions.

Since the adoption of the Shipping Act, the Board has uniformly held that the contract system is not illegal *per se*; but that the legality or illegality of such system must be determined in each case by the appli-

cation of criteria such as were specified by this Court.[6] On well recognized principles great weight should be attributed to this practical construction by the Board.

In *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922), the Board held that a contract system instituted by the only steamship line in the trade would tend only towards monopoly and was bad.

In *Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935) and in *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936) the Board held that a contract system established by an intercoastal conference was bad for the reasons that Section 3 of the Intercoastal Shipping Act (46 U. S. C. § 845) enabled the Board to establish a degree of stability which is impossible in international shipping; and that the conference agreement was restrictive with respect to the admission of new members (1 U. S. S. B. B. at 530). The only purpose of that contract system was to create a monopoly. As we have seen, the Board was sustained in its position by this Court (*Swayne & Hoyt*, 300 U. S. 297 (1937)).

In *Rawleigh*, 1 U. S. S. B. 285 (1933), a contract system was attacked by a non-contract shipper who sought to recover the difference between the non-contract rates which he had paid and the lower contract rates. After holding that each contract system must be adjudged on its merits (*id.* at 291), the Board proceeded to uphold the system under attack on the ground that "Operators of vessels in foreign commerce of the United States may at any time and without warning be subjected to severe competition by unregulated tramp vessels of any nation or by vessels chartered by shippers with large quantities of cargo to be

[6] In *Swayne & Hoyt*, 300 U. S. 297 (1937), quoted at pp. 27-28, *supra*.

transported. * * *'' (*id.* at 291-292). Thus, the competitive factor in the trade was found to be governing.

In *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa,* 1 U. S. M. C. 634 (1937) and *Sprague Steamship Agency, Inc.* v. *A/S Ivarans Rederi,* 2 U. S. M. C. 72 (1939), contract systems were attacked by competitive steamship companies who desired to enter the conferences and who had been excluded. The Board, after investigating the facts, upheld the contract systems *provided* the conferences should admit the complaining carriers to full and equal membership.

In *Pacific Coast European Conference Agreement,* 3 U. S. M. C. 11 (1948), the Board instituted a proceeding on its own motion to determine whether the conference agreement and amendments thereto, should be approved, cancelled or modified. The Antitrust Division of the Department of Justice intervened and urged that the agreement should be disapproved because the contract system practiced under the agreement was illegal. The Board concluded that some aspects of the contract system required revision but that the system, properly implemented, was essential in trade. The Board enumerated the factors which led to the conviction that the contract system was necessary (*id.* at 17):

> "As against these objections, the same witnesses were practically unanimous in stating that their industries were interested in, yes; dependent upon transportation which was dependable and stable, and 'known rates sufficiently in advance so that future sales would be protected * * * since we sell on a C. I. F. basis we could seriously be disturbed by such fluctuations that might otherwise occur.' It was stated that the incident of the chartering of a vessel by a buyer in Europe was very disturbing to the trade because of the resulting tendency towards instabil-

ity of rates. It appeared that without some form of contract rate instability would unquestionably result. Such testimony from the very shippers who had objected to the contract rate, supporting, as it does, the testimony on behalf of the carriers in the trade and the disruption of the conference, is compelling. This trade is highly competitive, of a seasonal nature that lends itself to inviting outsiders to appear to get the profits and to disappear during the off season. The members of the conference had at no time denied membership to any applicant carrier. The contract rate system is a necessary practice in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates."

The Board thereupon performed its legislative function, which a District Court in an antitrust suit could not have performed, in directing the changes which the Conference was required to effect as a condition for the continuance of a contract system.

The foregoing cases indicate that throughout the history of the Shipping Act, the Board has so interpreted that Act as not to render contract systems illegal *per se*. This course of interpretation is entitled to great weight upon the central issue of illegality.

In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915), the following appears as the basis for this rule:

"2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthor-

ized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

We also refer to *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524-525 (1940).

SECOND POINT.

THE STATUTORY LAW SUPPORTS PETITIONERS' CONTENTIONS THAT THE SHIPPING ACT, TO THE EXTENT OF THE MATTERS EMBRACED BY IT, HAS SUPERSEDED THE SHERMAN ACT; THAT THE BOARD HAS EXCLUSIVE JURISDICTION OF THE SUBJECT MATTER; AND THAT THE CONTRACT SYSTEM IS NOT ILLEGAL *PER SE*.

(a) The Shipping Act has *pro tanto* superseded the Sherman Act.

1. The provisions of the Shipping Act.

The philosophy of the Sherman Act is that the public good is served only by free and unfettered competition. In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 491-493 (1940), this Court stated:

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which

> tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

The Sherman Act was entirely prohibitory and restrictive in character. On the other hand, as pointed out in *United States Navigation*, 284 U. S. 474, 485 (1932), the Shipping Act grants privileges as well as imposes restrictions:

> "The [Shipping] Act is restrictive in its operations upon some of the activities of common carriers by water, and permissive in respect of others. * * *"

It is instinct with the philosophy that in water transportation, free competition, rather than monopoly, is the evil to be avoided; but that specific evils in the use of the combined power of shipping conferences must be prohibited in the public interest. These evils are specifically catalogued in the Act. Over these shipping conferences there was set the powerful Board with all inclusive inquisitorial rights and with full jurisdiction to hear, determine and restrain. Moreover, the separate wrongs which the common carriers were enjoined to avoid are in every instance made either misdemeanors punishable by the imposition of heavy fines, imprisonment, or both; or are made punishable by heavy penalties. A study of these provisions is convincing that conduct prohibited by the Shipping Act as well as conduct permitted by that Act is eliminated from the scope of the Sherman Act.

The core of the Shipping Act is Section 15 (46 U. S. C. § 814) which is both restrictive and permissive, but predominantly permissive. That section requires common carriers by water to file with the Board every agreement with other common carriers "fixing or regulating transportation rates or fares;

giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The term "agreement" is thereupon defined as including "understandings, conferences, and other arrangements."

Then follows the provision giving the Board the power to act upon such agreements between common carriers. The language of the statute is:

> "The * * * [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be *unjustly discriminatory or unfair as between carriers,* shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors *or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter* [*Act*], and shall approve all other agreements, modifications, or cancellations." (Italics supplied.)

The Board is thus vested with the power initially to determine whether any agreement submitted to it by common carriers is unjustly discriminatory between carriers, or operates to the detriment of the commerce of the United States, or is in violation of the Shipping Act. Irrespective of the action initially taken by the Board with respect to an agreement, it may at any time disapprove, cancel or modify an agreement which is found thus to be discriminatory, detrimental or illegal. The section provides that all agreements made after the organization of the Board "shall be lawful only when and as long as approved by the * * * [Board], and before approval or after disapproval it shall be unlawful to carry out in whole

or in part, directly or indirectly, any such agreement, modification, or cancellation."

Thus, Section 15 confers the aegis of legality upon such agreements which have received the Board's approval. With equal force and without reference to the Sherman Act or any other statute, it *condemns as illegal* any such agreement which shall not have received Board approval or which, once having been approved, shall thereafter be disapproved.

Then follows the provision which excepts all such agreements, lawful under Section 15, from the provisions of the antitrust laws. Characteristically, Section 15, which grants to common carriers by water the benefits of conference action, concludes with the monition:

> "Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Section 15, then, is the charter under which conferences are formed for the accomplishment of the purposes specified in the section. The permitted purposes are the very antithesis of purposes which may be pursued by persons subject to the Sherman Act, *e. g.*, controlling, regulating, preventing or destroying competition.

The remainder of the regulatory portions of the Shipping Act have to do primarily with the detailed specification of conduct in which common carriers by water, acting either alone or in combination, are prohibited from indulging.

Section 14 (46 U. S. C. § 812) prohibits carriers from paying deferred rebates, from using fighting ships, from retaliating against shippers by refusing space accommodations, or by resort to other discrim-

inatory or unfair methods, from making unfair or unjustly discriminatory contracts with shippers based upon volume of freight offered and from discriminating against shippers in matters of cargo space accommodations, proper loading and discharge of cargoes and the adjustment of claims.[7] Section 14 does not stop there, however. It provides that the carrier who violates the section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Section 16 (46 U. S. C. § 815) declares that it shall be unlawful for any common carrier to give any undue or unreasonable preference to any person, locality or description of traffic, or to subject any person, locality or description of traffic to prejudice or disadvantage; to allow any person to obtain transportation of property at less than the regular rates by means of false billing, false classification and the like; or to induce any marine insurance company not to give a competing carrier as favorable hull or cargo insurance rates as those granted to the carrier. Section 16 does not, however, halt with the enumeration of these prohibitions. It provides that, whoever violates the section, shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Section 17 (46 U. S. C. § 816) prohibits carriers from charging rates which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to American exporters as compared with their foreign competitors, and requires every carrier to establish reasonable regulations and practices relating to the receiving, handling, storing, or delivering of property. It empowers the Board to alter any rates, charges

[7] Since the Attorney General bases his argument principally on Section 14, a more detailed analysis of that section will be found *infra*, pp. 63-71.

and the like to the extent necessary to correct discrimination and prejudice; to order the carrier to discontinue the discriminatory and prejudicial practice; and to prescribe just and reasonable regulations and practices with respect to receipt and delivery of cargo.

Sections 18 and 19 (46 U. S. C. §§ 817 and 818) deal exclusively with common carriers by water in interstate commerce. Section 20 (46 U. S. C. § 819) prohibits the disclosure of confidential information acquired by a common carrier. These sections are of no particular significance to this case.

Section 21 (46 U. S. C. § 820) enables the Board to require common carriers to file with it detailed data under oath concerning the carriers' business. This section gives the Board sweeping inquisitorial powers. It provides that anyone who shall fail to furnish the Board demanded information, shall forfeit to the United States the sum of $100 for each day of default, and that anyone who wilfully falsifies any such report shall be guilty of a misdemeanor and punished by a fine of not more than $1,000, or imprisonment for not more than one year, or both.

Section 22 (46 U. S. C. § 821) is the primary source of the Board's jurisdiction. It provides that the Board may act either upon its own motion or upon a sworn complaint filed by "any person" setting forth any violation of the Shipping Act by a common carrier by water. The section authorizes the Board to make such order as it deems proper.

Section 23 (46 U. S. C. § 822) provides for Board action only "after full hearing".

Section 24 (46 U. S. C. § 823) directs that the Board shall enter and publish a written report of every investigation made under the Act.

Sections 25 to 28 (46 U. S. C. §§ 824-827) contain further specifications of the manner in which the Board shall exercise its jurisdiction and powers, including provisions for the issuance of subpoenas, provisions with respect to self-incrimination, and the like.

Section 29 (46 U. S. C. § 828) contains a specific provision relative to the action which may be taken by the Attorney General. It is there provided that in case of a violation of any Board order other than one for the payment of reparations, the Attorney General may apply to a District Court to enforce obedience to the order by writ of injunction or other process, mandatory or otherwise.

Section 30 (46 U. S. C. § 829) provides for the enforcement of a Board order for the payment of reparations, and Section 31 (46 U. S. C. § 830) prescribes the venue and procedure in suits brought to enforce, suspend, or set aside Board orders.

Apparently, fearing that some violator of the Act may not have had his just punishment prescribed in the preceding sections, the Congress inserted the omnibus Section 32 (46 U. S. C. § 831):

> "Whoever violates any provision of this chapter [Act], except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by a fine not to exceed $5,000."

Thus, the Shipping Act provided not only a completely new substantive statutory law of shipping, but a complete system of remedial and retributive justice applicable thereto. We urge that, on the basis of the affirmative provisions of the Shipping Act, not a shred of the Sherman Act remains applicable to any of the activities of common carriers by water which are dealt with in this legislation.

We concede that all of the members of a conference would be amenable to Sherman Act prosecution

if they should conspire with industrial or commercial shippers so as to restrain trade or produce a monopoly in the fields of commerce or industry in which such shippers might be engaged. The basis of liability in such case is delineated in *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936), as follows:

> "In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. * * * [citing cases] One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. * * * [citing cases] If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity."

To such an extent, it is true, that the mere circumstance that common carriers in foreign commerce are subject to regulation by an administrative body, does not exempt them from antitrust prosecution. *Cf. United States* v. *Borden Co.*, 308 U. S. 188 (1939). Nonetheless, we submit that it is clear from the foregoing analysis of the Shipping Act that any action by a conference or its members which may be unfairly or unduly prejudicial to the rights of shippers or of competitors in the field of shipping, constitutes a violation of the Shipping Act and not of the Sherman Act, with the purposes of which it is diametrically in conflict.

2. The Shipping Act considered in the light of other legislation.

Under the preceding head we hope that we have demonstrated that the provisions which the Congress did incorporate into the Shipping Act strongly evince the legislative purpose to supplant the Sherman Act by the Shipping Act so far as concerns any question relative to competition in the shipping industry. Petitioners here put forward the view that the Shipping Act is as eloquent in their favor by reason of provisions which the Congress *did not* incorporate in the Shipping Act. This we propose to do by considering the provisions of the Shipping Act in their relations to, or in contrast with, provisions of other statutes.

(i) *Comparison With the Interstate Commerce Act.*

It is noteworthy that the Shipping Act has been analogized to the Interstate Commerce Act (*United States Navigation*, 284 U. S. 474, 480-481 (1932)). Section 9 of the Interstate Commerce Act (49 U. S. C. § 9) provides, so far as here material:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions

of this chapter [Act] may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter [Act] in any District Court of the United States of competent jurisdiction * * *."

Section 22 of the Interstate Commerce Act (49 U. S. C. § 22) provides, so far as here material:

"nothing in this chapter [Act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter [Act] are in addition to such remedies * * *."

The Shipping Act contains no grant of jurisdiction to the District Courts over matters coming within the scope of the Shipping Act except possibly in suits for the punishment of crimes or the recovery of penalties for the commission of acts prohibited by the Shipping Act. Nor does the Shipping Act save any remedies, common law or statutory, which were in existence at the time of the enactment of the law. In view of the similarity of the general purposes of the Shipping Act and the Interstate Commerce Act, we submit that these omissions are significant of a Congressional purpose to vest exclusive primary jurisdiction in the Board over all controversies which involve a violation of the Shipping Act.

A comparison of the provisions of the Shipping Act with similar provisions of the Interstate Commerce Act, as amended by the Transportation Act of 1940, is even more illuminating.

Section 5(1) of the Interstate Commerce Act (49 U. S. C. § 5(1)) declares that it shall be unlawful for any rail, motor or water carrier subject to that Act to enter into agreements with like carriers for the pooling

or division of traffic or of service or of earnings, unless the Commission approves such agreements. However, before the Commission may approve such agreements, it must find that they "will not unduly restrain competition". Furthermore, Section 5(2) (49 U. S. C. § 5(2)) declares lawful certain mergers and consolidations between carriers after the Commission has approved the same. However, the Commission is admonished not to enter an order approving a consolidation between a railroad and a motor carrier unless it finds that the transaction proposed "will not unduly restrain competition". Subdivision 11 of Section 5 (49 U. S. C. § 5(11)) exempts carriers who participate in transactions approved or authorized under the provisions of Section 5, from the operations of the antitrust laws.

The Interstate Commerce Act, as thus amended, has certain features in common with the Shipping Act in that both statutes authorize cooperative action among competing carriers. It is, however, significant of the congressional purpose to free the activities of common carriers by water in foreign commerce from the operation of the Sherman Act that, whereas, in the statute regulating interstate transportation, a condition precedent to much of the lawful cooperation is that the Interstate Commerce Commission must find that the agreement does not "unduly restrain competition", the Shipping Act does not place any similar injunction or limitation upon the Board acting under Section 15 of the Shipping Act.

In *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944)—a case involving an interpretation of the Interstate Commerce Act as amended by the Transportation Act of 1940—the Court stressed that the Congress left to the Commission the task of balancing the advantages of improved service, safer operation, lower costs, and the like, against the effects

of curtailment of competition. In this context, the Court said:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' * * *"

We submit that it would be paradoxical to invoke the wisdom and experience of the Commission and not of the courts in respect to a statute which specifically imports the concept of free competition and to permit similar issues to be determined by a District Court in an antitrust suit against carriers cooperating under a statute which does not even mention free competition.

(ii) *Section 16 of the Clayton Act.*

Section 16 of the Clayton Act (15 U. S. C. §26) specifically gives to "Any person, firm, corporation, or association" injured by a violation of the antitrust laws, the right to sue for injunctive relief. Section 16, however, contains the proviso that no person, firm,

corporation, or association, *except the United States,* shall have the right to bring a suit for injunctive relief "against any common carrier subject to the provisions of Chapters 1 and 8 of Title 49, in respect of any matter subject to regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

This legislation was enacted on October 15, 1914, less than two years prior to the adoption of the Shipping Act on September 7, 1916. Upon the adoption of the Shipping Act, the Congress neither amended Section 16 so as to bring ocean carriers within the purview of its proviso nor incorporated into the Shipping Act any provision having like effect. Since the adoption of the Shipping Act, both that Act and the Clayton Act have been frequently amended. Nonetheless, the proviso in Section 16 stands today as originally enacted.

It results that, although carriers subject to the Interstate Commerce Act are by statute made subject to one rule when a suit in equity under the Sherman Act is instituted against them by the Government, and another rule when a similar suit is instituted against them by a private litigant, no such distinction has ever been imported into the statutory law with respect to carriers by water in foreign commerce.

Hence, this statute cannot explain even inferentially the Court's refusal in *United States Navigation,* 284 U. S. 474 (1932), to approve of the maintenance of an antitrust action by a private litigant against a steamship conference. Indeed, the comparative history of Section 16 of the Clayton Act and of the Shipping Act constitutes persuasive evidence of the congressional purpose that both Government and private litigant should be dealt with on the authority of *United States Navigation.*

(b) The Shipping Act does not outlaw conference contract systems.

The argument in support of the contention that the Shipping Act renders the contract system illegal *per se* is predicated upon the hypothesis that the maintenance of such system prevents or destroys competition between the conference and non-conference lines and, therefore, Board approval of the system under Section 15 (46 U. S. C. § 814) cannot be given; and, further, that Section 14 (46 U. S. C. § 812), subdivision Third of the Shipping Act, specifically bans the contract system. Persuasive argument against those contentions has already been put forward in the briefs submitted by appellants in Nos. 134 and 135. We adopt what has there been said and shall attempt to avoid repetition. Additional conclusive demonstration, we submit, is to be found in the statute itself.

Section 15 authorizes the Board to approve an agreement among common carriers "controlling, regulating, preventing, or destroying competition." The Attorney General would read into this plain and unequivocal language the qualification that the only kind of competition which may be prevented or destroyed is competition among the members of the conference. Section 15 contains no such qualification. On the other hand we submit that it contains internal evidence that it authorizes the Board to approve agreements which would prevent or destroy competition between conference lines and non-conference lines.

In the first place, it is to be noted that the section authorizes conferences to fix or regulate transportation rates or fares, and to pool or apportion earnings or traffic and to allot ports and restrict sailings and to limit and regulate the character of freight to be carried. Here, we find specific provisions *which, without more, prevent or destroy competition among the conference lines.* If the authorization of Section

15 had not been drafted for the purpose of permitting the prevention or destruction of competition with outside lines, the language relative to such prevention and destruction would have been mere surplusage.

But even more unmistakable evidence of such purpose is that Section 15 provides that the Board may, by order, disapprove, cancel or modify any agreement "whether or not previously approved by it, that it finds to be *unjustly discriminatory or unfair as between carriers,* shippers, exporters, importers or ports * * *" (Italics supplied). Section 15, therefore, contemplates that conference agreements may be discriminatory as between carriers; and such agreements have the blessing of Section 15 unless they are unjustly discriminatory. We take it to be obvious that conference members would be most unlikely to enter into a conference agreement which is discriminatory among themselves. This provision, therefore, leads inescapably to the conclusion that the Congress contemplated that there would be conference agreements which would be discriminatory against non-conference lines. The non-conference lines have the remedy of seeking the disapproval or cancellation of the conference agreement if it proved to be unjustly discriminatory. This argument is fortified by the fact that "shippers, exporters, importers or ports", discrimination against whom would also result in the cancellation of a conference agreement, are obviously not members of the conference.

In *Phelps Bros.*, 1 U. S. M. C. 634 (1937), and in *Sprague Steamship Agency*, 2 U. S. M. C. 72 (1939), non-conference lines, seeking membership in conferences maintaining contract systems, attacked conference agreements as being unduly discriminatory as against them. In each case the Board ruled that it would give consideration to an order disapproving the conference agreement under Section 15 unless the applicant were promptly admitted to equal member-

ship. Our research has disclosed no case in which any carrier has ever attacked a conference of which it was a member as being discriminatory against it.

Further force is lent to this contention by a comparison between the provisions of Section 15 and those of Section 14. We find that Section 14, subdivision First, prohibits common carriers by water *to enter into agreements* to pay or allow a deferred rebate, and that Section 14, subdivision Second, prohibits a common carrier by water, *in conjunction with any other carrier through agreement or otherwise,* to use a fighting ship. If any conference practices can be utterly destructive of non-conference competition, they are the deferred rebate and the fighting ship. If Section 15 were not intended to authorize common carriers to enter into agreements which would have the effect of preventing or destroying competition, then the first and second subdivisions of Section 14 would have been limited in their prohibitions to common carriers acting independently. There would then have been no occasion to prohibit carriers acting pursuant to an agreement from using the deferred rebate and the fighting ship, for it is only pursuant to Section 15 that two or more common carriers may act under agreements among themselves. The interpretation which the Attorney General would ascribe to Section 15, therefore, renders surplusage the provisions of subdivisions First and Second of Section 14, to the extent that they apply to combined action of carriers.

Section 14, however, contains even stronger internal evidence that it was not intended to outlaw the contract system. It has been noted that subdivision First makes illegal the payment of a *deferred* rebate to any shipper as a consideration for giving all or any portion of his shipments to the same or any other carrier, and is at pains to define the meaning of the deferment. It

is clear that Section 14 does not outlaw *all* rebates, in consideration of exclusive patronage.

If Section 14 contemplates that carriers may, with the approval of the Board, pay *current* rebates for exclusive patronage, it would involve an anomaly to give any portion of that section an interpretation which would render it illegal for the carriers, in the first instance, to charge to the shippers the net amounts of freight which it is intended that they should pay in consideration for exclusive patronage. If, on the other hand, subdivision Third should be construed to outlaw the current payment of rebates, then it should, *a fortiori*, be held to outlaw the payment of deferred rebates. Such construction would render surplusage the whole of subdivision First.

Section 14 is highly penal. Violation is made a misdemeanor, punishable by a fine of not more than $25,000 for each offense. This is the greatest money penalty prescribed in any of the sections of the Shipping Act. If the contention of the Attorney General that a violation of Section 14 also involves a violation of the Sherman Act were correct, then the civil and criminal penalties and forfeitures of the Sherman Act would be heaped upon the fines prescribed by Section 14. It is axiomatic that penal statutes must be narrowly construed so as not to bring within their purview any acts not specified by the language employed by the legislature.

The rule was thus stated in *United States* v. *Resnick*, 299 U. S. 207, 209 (1936), as follows:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. * * *"

We submit that a common business practice such as the contract system should not be held to constitute

a crime unless the statute defining the crime clearly so requires.

Similarly, although subdivisions First and Second explicitly provide that the practices of the deferred rebate and of the fighting ship may not be indulged in by carriers acting under agreements, subdivision Third, which is pointed to as dealing with the contract system, does not purport to regulate the conduct of carriers acting under agreements. Nor is this defect supplied by the insertion of the words "directly or indirectly" in the introductory paragraph of Section 14. Those words apply to subdivisions First and Second as well as to subdivision Third. Conference action is not the indirect action of the conference members. It is group action, but it is direct action, unless performed through an intermediary. To apply subdivision Third to conference action, therefore, would again be tantamount to an expansion of this crime-defining section to cover offenses not clearly within its purview.

Nor will the argument that subdivision Third of Section 14 contains language appropriate to accomplishing the outlawing of the contract system bear scrutiny. The Court will note that subdivision First of Section 14 outlaws *per se* the payment of deferred rebates and defines the deferred rebate in terms of such clarity as legislation seldom attains. It will also be observed that subdivision Second of Section 14 outlaws the fighting ship and defines the term "fighting ship" in such unequivocal language that a school child can understand it. Yet, the Attorney General urges a view which can be supported only on the hypothesis that the same legislative draftsmen suddenly became completely inarticulate in drafting subdivision Third, and used the most appropriate language of subdivision Third to express an intent to outlaw *per se* the contract system. Subdivision Third,

together with the introductory portion of Section 14, reads as follows:

> "No common carrier by water shall, directly or indirectly, * * *
>
> * * * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space acommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The word "contract" cannot be found in this subsection. The complaint does not allege that the contract system constitutes retaliation by refusing, or threatening to refuse, space accommodations, when available. The Attorney General is, therefore, relegated to the argument that the contract system constitutes a "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * *."

The contract system cannot be looked upon as a discriminating or unfair method practiced because the shipper has patronized any other carrier. Conference freight contracts are equally available to shippers who have, and to those who have not, shipped by outside lines. The contract rate is afforded to the contract shipper not because he has in the past refused to patronize outside lines, but because he has entered into the contract entitling him to those rates. A shipper who has consistently shipped by outside lines may enter into the freight contract and he will receive the contract rate with respect to the first shipment that he makes thereunder.

It has been argued, however, that the effect of retaliation and of discrimination and unfairness is accomplished by the terms of the conference freight

contract. It is argued that the contract holds over the shipper the threat that if, having agreed to ship by conference vessels, he should make any shipments by a non-conference line, he will thereafter be penalized by being required to pay at non-contract rates or by being subjected to some other unfair and unjust treatment. Of course, it might possible so to draft a conference freight contract that the contract shipper might be made to suffer unduly from a breach of his contract. Indeed, we are not too proud of the liquidated damage clause contained in the 1945 form of the Far East Trade Agreement, a copy of which is Exhibit B annexed to the complaint (Par. 33, R. 6; R. 16). However, the Board, as the guardian of the shippers' interests, has long ago disapproved of such form of liquidated damage clause.

In *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948), the Conference had proposed a form of liquidated damage clause, perhaps even more drastic than that included in the 1945 form of the Far East Conference. During the course of the hearing, the Conference had proposed to amend the clause. Both the original and the amended clause appear at page 18 of the report. Both of them were subject to the objection that in case of violation by the shipper, the contract itself would become null and void as to future shipments and would require the shipper to pay at non-contract rates for all shipments made by him during a period prior to the date of violation. The Board disapproved both of these forms and suggested the appropriate basis for a liquidated damage clause (*id.* at 18-19):

> "The first and second objectionable features are thereby eliminated. The retroactive feature, however, is retained. This feature is open to criticism because of the unequal manner in which it would operate. A shipper in large volume and of great frequency finds himself in such a posi-

tion that the amount which he would have to pay, if he used an occasional carrier, would be such as to compel him to use the conference carriers permanently, whereas the infrequent shipper or one who ships in very small volume would not be deterred by reason of the penalty. The purposes of the clause—to reimburse the carriers for losses suffered by violation of the contract and to prevent breaches in the future—have not been attained.

"Conferences have long been confronted with the problem of damages with respect to possible breaches of the conference agreement by its members, and in many cases have fixed the damages to be paid, where the breach has involved the cutting of rates at the amount of the freight involved or at a certain number of times thereof. This establishes a definite formula by which the penalty can be calculated and has no retroactive feature. Respondents will be expected to amend the liquidated damages clause of their contract somewhat along the lines indicated herein."

If a violation by the shipper of his conference freight agreement does not entail the future payment of the non-contract rate and has as its only consequence the assessment of damages computed on a compensatory and non-punitive scale, there can be no basis for the contention that the contract system constitutes a threat of retaliation or a retaliation in the future. Thus, it appears that a specially trained regulatory agency is equipped to and can prevent any abuse of the contract system which might even metaphorically be referred to as retaliatory or discriminatory.

The Attorney General may further point out that the phrase "discriminating or unfair methods" used in subdivision Third of Section 14, is not qualified by any such word as "unduly", "unjustly", "un-

fairly", or "unreasonably". Enough has appeared to indicate that petitioners' contention is that it is more or less a matter of indifference whether these modifying adverbs be or be not implied, for the reason that an appropriate form of freight contract would provide for mere compensation in case of breach, so that there would be no discrimination of any kind. Be that as it may, the words "or unfair" which follow the word "discriminating" undoubtedly introduce the same overtone of meaning to the word "discriminating". Such, apparently, was the view of this Court in deciding *Swayne & Hoyt*, 300 U. S. 297, 304 (1937), for, in laying down the basis of the judgment which the Board must exercise with respect to contract systems, the following language was used:

> "*In determining whether the present discrimination was undue or unreasonable* * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (Italics supplied.)

United States v. *Wells-Fargo Express Co.*, 161 F. 606, 610 (C. C. N. D. Ill. 1908), establishes the proposition that the unqualified word "discrimination" imports the concept of undue or unjust discrimination. The defendant was prosecuted for discrimination in violation of certain sections of the Interstate Commerce Act, among them Section 1 of the Elkins Act (49 U. S. C. § 41). In commenting on the absence of an adjective modifying the term "discrimination", the Court said:

> "Amended section 1 of the so-called Elkins act differs from sections 2 and 3 of the original act,

among other matters, in this: That the word 'discrimination' is used in the former without any qualifying adjective, as 'unjust,' etc. It is contended by the government that this omission discloses the intention on the part of Congress 'to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute.' It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in these cases. Webster defines the word 'discrimination,' with reference to railroads, as 'the arbitrary imposition of unequal tariff for substantially the same service,' investing it with the sense of unjustness and unfairness. So far as appears, the Supreme Court has not had its attention called to the change, and has given it no construction."

The judgment of the District Court was affirmed in *American Express Co.* v. *United States,* 212 U. S. 522 (1909). That the Court specifically ruled on this question is shown in the following quotation (*id.* at 531-532):

"The provisions of the Elkins act to which we have referred have been the subject of consideration in recent cases before this court. * * * [citing cases] It is unnecessary to repeat the discussion had in those cases as to the prior legislation and the reasons of public policy which led up to the enactment of the sections of the Elkins act above

quoted. It is enough to say that it was the purpose of this law to require the publication and posting of tariff rates, open to public inspection, and at the service of all shippers alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences and all acts of *undue discrimination.* * * *" (Italics supplied.)

Other cases to the effect that the concept of discrimination is meaningless unless it is limited to that conduct which is unjust, unfair, and unreasonable are: *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937) (due process and equal protection under the 14th Amendment); *Gulf, C. & S. F. Ry. Co.* v. *Miami S. S. Co.*, 86 F. 407, 416-419 (5th Cir. 1898); *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 F. 576, 626-634 (C. C. Ky. 1889), *app. dism. per cur.*, 149 U. S. 777 (1893) (interpreting Sec. 3 of the Interstate Commerce Act, 49 U. S. C. § 3); but *cf. Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 538 (N. D. N. Y. 1937); and *Cumberland Telephone & Telegraph Co.* v. *Kelly*, 160 F. 316, 319-320 (6th Cir. 1908); *Harp* v. *Choctaw, O. & G. R. Co.*, 125 F. 445, 453-454 (8th Cir. 1903); *Yancey* v. *Batesville Telephone Co.*, 81 Ark. 486, 494-495 (1907) (interpreting state statutes). This principle prevailed at common law: *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92, 99-100 (1901); *Root* v. *The Long Island Railroad Co.*, 114 N. Y. 300, 304-305 (1889).

A study of the entire Shipping Act, we submit, compels the conclusion that Section 14 is not at all the statutory provision which applies to the contract system. Rather, it is Section 17 (46 U. S. C. § 816). This section provides that:

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate,

fare, or charge which is unjustly discriminatory between shippers * * *."

Section 17 thereupon vests in the Board specific authority "to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge." Hence, the section gives to the Board complete power to bring a contract system in any foreign trade to an end or to correct its operation so as to eliminate objectionable features.

An analysis of the relevant statutory material, therefore, demonstrates that the contract system is not illegal *per se*, that the exclusive power to pass upon the validity of contract systems is vested in the Board, that no cause of action under the Sherman Act can be predicated upon the maintenance of a contract system, and that the District Court has no jurisdiction to determine the validity or propriety of a contract system in a suit instituted under the Sherman Act.

THIRD POINT.

THE LEGISLATIVE HISTORY OF THE SHIPPING ACT SUPPORTS THE INTERPRETATION WHICH WE URGE.

The legislative history of the Shipping Act, we submit, removes any possible doubt that the interpretation for which petitioners contend is the only permissible one.

(a) The background of the Alexander Committee investigation.

The Shipping Act resulted from an investigation conducted by the Committee on the Merchant Marine and Fisheries of the House of Representatives. The

Chairman of this Committee was, Representative Alexander, of Missouri. The Committee is accordingly commonly referred to as the Alexander Committee. The Alexander Committee conducted its investigation under successive resolutions adopted, respectively, on February 24, 1912, and June 18, 1912, (H. Res. 425, 62d Congress, 2d Session and H. Res. 587, 62d Congress, 2d Session).[8]

Prior to the adoption of the former of these two resolutions, two antitrust actions had been instituted against steamship conferences—*Thomsen* v. *Union Castle Mail S. S. Co.*, 149 F. 933 (C. C. S. D. N. Y. 1907); *rev'd*, 166 F. 251 (2d Cir. 1908); retried (case not reported); *rev'd sub nom.*, *Union Castle Mail S. S. Co.* v. *Thomsen*, 190 F. 536 (2d Cir. 1911); *rehearing* 190 F. 1022 (2d Cir. 1911); *rev'd sub nom.*, *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), in which shippers sued the members of the conference in the South African trade under Section 7 of the Sherman Act (15 U. S. C. § 15) to recover treble damages, and *United States* v. *Hamburg-American S. S. Line*, 216 F. 971 (S. D. N. Y. 1914); *rev'd as moot*, 239 U. S. 466 (1915), in which the United States instituted an antitrust suit against the conference in the Transatlantic trade. Before the adoption of the second of the two resolutions authorizing the Alexander Committee investigation, two additional antitrust suits had been instituted by the United States against the conferences in the South American trade and the Far East trade, respectively—*United States* v. *Prince Line*, 220 F. 230 (S. D. N. Y. 1915); *rev'd as moot*, 242 U. S. 537 (1917) and *United States* v. *American-Asiatic Co.*, 220 F. 230, 235 (S. D. N. Y. 1915); *rev'd as moot*, 242 U. S. 537 (1917). In essence, these actions charged that the conferences paid deferred rebates, employed fighting ships, and the like.

[8] For citation of these resolutions, please refer to footnote No. 9 at page 74.

The Conferences defended upon the ground that the economic factors peculiarly affecting ocean transportation, justified these practices and, hence, they were not in violation of the Sherman Act.

A mere reading of the enabling resolutions carries conviction that the House acted on the assumption that shipping conferences were violative of the best interests of the commerce of the United States; but that the House was uncertain whether such conferences violated the Sherman Act or any other law of the United States. Under the authority of these resolutions, the Alexander Committee conducted a searching scrutiny of the entire subject for a period of almost two years. The Report of this Committee stands as a landmark in the shipping history of the United States.[9]

Lest there be any doubt as to the legislative climate in which the Alexander Committee operated, it should be remembered that the major portion of its labors was performed during the life of the Congress which adopted the Clayton Act. Moreover, all of the Court decisions (excepting the District Court decision upon the second trial of *Thomsen* v. *Union Castle Mail S. S. Co., sub nom., Thomsen* v. *Cayser* (not reported, and reversed in 190 F. 536 (2d Cir. (1911)), rendered in the antitrust cases above referred to prior to the adoption of the Shipping Act, had held that the Sher-

[9] This Report and the evidence upon which it was predicated were printed in four volumes entitled, Investigation of Shipping Combinations Under House Resolution 587 (Government Printing Office 1913). Matters appearing in these volumes will be referred to by the number of the volume in which the respective matters appear and the pages at which they appear, *e.g.*, 1 Alexander Rep. 20. The resolutions authorizing the investigations will be found at 4 Alexander Rep. 8-10. Volume 4 of the Report, to which most of our citations refer, is embodied in H. R. Doc. 805, 63d Cong., 2d Sess. (1914) and the page references to 4 Alexander Rep. are identical with those in H. R. Doc. 805.

man Act did not condemn the Conference's practices.[10] It, therefore, might have been expected that the Committee would recommend either a broadening of the Sherman Act so as to condemn conference action beyond peradventure, or would recommend the adoption of a separate law having similar effect.

The Alexander Committee called numerous witnesses, examined a great volume of conference agreements and other documents and data, circularized shippers with questionnaires, wrote to official representatives of the United States abroad, and pursued, indeed, every avenue for the securing of relevant in-

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[10] *Thomsen* v. *Cayser* reached this Court for argument in April, 1914, was restored to the docket for reargument in June, 1915, was reargued in January, 1917, and decided in March, 1917. The decision of this Court was that the conduct by the defendant carriers did violate the Sherman Act. The case came up, however, after a peculiar judicial history. At the first trial, the District Court dismissed the complaint at the close of the plaintiff's case on the ground that no violation of the Sherman Act had been proved (149 F. 933). The judgment of dismissal was reversed by the Circuit Court of Appeals, 2d Circuit (166 Fr 251), on the ground that no question of the reasonableness of the practice was involved. The case was sent back for a new trial. Upon the second trial, a judgment was entered in favor of the plaintiffs. All questions of the economic justification for the practice of the conference was excluded because of the ruling of the Circuit Court of Appeals. The conference appealed to the Circuit Court of Appeals, which again reversed on the ground that, because of the decisions of this Court in the *Standard Oil* (221 U. S. 1 (1911)) and *Tobacco* (221 U. S. 106 (1911)) cases, the construction placed upon the Sherman Act upon the first appeal had been erroneous. The Circuit Court of Appeals thereupon ordered a third trial. The plaintiffs asked for a rehearing. They argued that they should not be required to try the case again and filed a consent that upon the reversal of the judgment of the District Court, the complaint should be ordered dismissed. Briefs of conference counsel indicate that the defendants protested that to follow such course would deprive them of the privilege of placing in the record evidence of the justification for the use of the deferred rebate system, the fighting ship and the like. Nonetheless, the Circuit Court of Appeals, upon the rehearing, handed down a mandate requiring a dismissal of the complaint. The case, therefore, came before this Court upon what seems to have been a fragmentary record.

formation. Furthermore, the Committee had before it, and gave full consideration to, the testimony and exhibits in the antitrust cases above referred to, as well as the Report of the Royal Commission appointed by the British Government in 1906 to investigate so-called shipping rings (4 Alexander Rep. 2-6).[11]

As a result of this investigation, the Alexander Committee recommended that the interests of American commerce as well as of the shipping industry could not be served by a prohibition of conference action but rather by a legalization of conferences which should comply with certain statutory requirements, which should be approved by the administrative agency set up for that purpose, and which should at all times be subject to public scrutiny; and by a proscription of certain invidious practices precisely defined in which conferences had in the past indulged.

(b) Peculiar economic factors affecting ocean transportation.

One of the chief factors which apparently influenced the Alexander Committee in reaching its conclusions was the distinction which it found between economic conditions affecting foreign ocean carriers and those affecting domestic and particularly rail carriers.

One distinction is that ocean liner services are at all times subject without notice to competition in the carriage of bulk commodities by tramp ships from the great reservoir of vessels in the world charter market (4 Alexander Rep. 309).

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[11] The Reports of the Royal Commission are entitled, "Reports from Commissioners, Inspectors, and Others: 1909; Cd. 4668-4670". Further material upon this subject may be found in the Final Report of the Imperial Shipping Committee on the Deferred Rebate System, Cmd. 1802, published in 1923. This later Report, of course, was not before the Alexander Committee.

The second point of contrast is that the unit of transportation by water is inflexible, *i. e.*, the total capacity of the ship; whereas, in rail transportation, it is possible to lengthen or shorten trains as the traffic requires (4 Alexander Rep. 310).

A third distinguishing feature is that steamships, not operating over fixed rights of way pursuant to governmentally granted franchises, have charter values so that, unless liner freights can be kept at a reasonably stable level of compensatory rates, the vessels will be lured from one trade to another, according to the fluctuations of the charter market in various parts of the world (4 Alexander Rep. 310-311).

Finally, the Committee found that ocean liners must have much greater freedom than railroads to change rates rapidly in order that the lines may afford to American exporters rates which will enable them to compete with their foreign competitors in a common market (4 Alexander Rep. 309).

It may be stated in passing that the Royal Commission reported (Reports from Commissioners, Inspectors, and Others: 1909; Cd. 4668 at pp. 48-49) and this report was substantiated by the evidence before the Alexander Committee (2 Alexander Rep. 1363) that a further distinction exists, *i. e.*, that a competitive liner service may be instituted at any moment without the investment of any substantial amount of capital, merely by securing tonnage in the charter market. Of course, no such consideration applies to rail carriers.

(c) It was the legislative purpose that the Shipping Act should *pro tanto* supersede the Sherman Act.

A study of the Alexander Committee Report is persuasive that because of the foregoing as well as other considerations, it was the purpose of the Shipping Act to remove the shipping industry from the

scope of the Sherman Act and to repose in the Board exclusive jurisdiction to prohibit acts which constitute a violation of the Shipping Act.

The Committee considered the effect of conference action upon the economic life of the nation and, we believe to its surprise, found it good. It set forth in its Report (4 Alexander Rep. 295-303), in elaborate summary, a statement of the benefits which were claimed to arise from conference action. It would be impossible here to condense this important summary but we believe that a synopsis of these advantages is here appropriate:

(1) A substantial increase in sailing opportunities.

(2) Fixed and dependable dates of sailing at regular intervals.

(3) Stability of freight rates over long periods of time, with the result, among others, that the American exporter is enabled to quote prices and make contracts for future delivery in competition with foreign merchants, without fear that instability or violent fluctuations in freight rates will introduce a speculative element into his bargain.

(4) Conferences are impelled by self interest to establish rates which will enable their American shippers to compete successfully with foreign merchants in the common market.

(5) Uniform freight rates made available to all shippers irrespective of size, economic power or volume of shipments.

(6) Prevention of the elimination of weaker steamship lines.

(7) Maintenance of proper relationships between freight rates from various sources of supply

(*e. g.*, America. United Kingdom and Continent) to common foreign markets.

The Committee, however, also pointed out evils which had arisen in conference operation (4 Alexander Rep. 304-307). These evils consisted of abuses in which the conferences might at one time or another have indulged, but which were susceptible of correction by appropriate regulation.

Considering all of the foregoing, the Committee concluded that the real ill to which the shipping industry is subject is not the malady of monopoly and restraints on competition, but the affliction involved in cutthroat competition and rate wars. Having enumerated the advantages and considered the disadvantages of conference action, the Committee continued (4 Alexander Rep. 416-417):

> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. *The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common owner-*

ship. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences* are not confined to the lines engaging in the foreign trade of the United States. They *are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)[12]

Thus, the Committee voiced its opposition to the application of the antitrust philosophy to the steamship business. The Committee, of course, was obliged to find the substitute for the antitrust approach. This it did in its recommendations (4 Alexander Rep. 418) as follows:

> "The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, *and can only be eliminated by effective Government control;* and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." (Italics supplied.)

The Committee, in the first instance, considered the vesting of the regulatory power in the Interstate

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[12] Conferences operating between the United Kingdom and the Far East may legally employ the deferred rebate system and use fighting ships as methods for maintaining stability of freight rates. *Mogul Steamship Co.* v. *McGregor,* 21 Q. B. D. 544, 548 (1888); aff'd. in the House of Lords, 1892 A. C. 25.

Commerce Commission. The fifth recommendation of the Committee evinces the purpose both to give to the Commission full power to adjudicate and dispose of issues such as are here presented (4 Alexander Rep. 421):

> "(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (*or to undertake such investigation on its own initiative*) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection *the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.*" (Italics supplied.)

The purpose to supersede the Sherman Act by the new legislation appeared even more clearly from the language of the Committee members on the floor of the House, when that body had resolved itself into the Committee of the whole for the purpose of debating H. R. 15455 which, with amendments not here relevant, finally was enacted as the Shipping Act.

Representative Burke, of Wisconsin, who was a member of the Committee which had reported the Bill, took the floor and rendered a long report explaining the purposes thereof (53 Cong. Rec. 8089). In discussing the "Ship-Trust Investigation", Mr. Burke stated (53 Cong. Rec. 8095):

> "This investigation disclosed the unfair practices resorted to by water carriers for the pur-

pose of destroying competition, and of discriminating and retaliating against persons and places who would not tamely submit to their dictation. It was found that, almost without exception, all of the merchant marine engaged in our foreign commerce resorted to the unfair practices known as deferred rebates, fighting ships, retaliation, and the making of unjust and discriminatory contracts relative to space accommodations, and with respect to loading and handling of freight in proper condition, and also with respect to the adjustment and settlement of claims. These practices were bitterly complained of by shippers and business men for years, *but there was no law to be found upon the statute books providing punishment for such offenses or relief from such practices.* Numerous other unfair practices in the business of transportation by water common carriers were found." (Italics supplied.)

To similar effect was a statement made on the floor by Chairman Alexander (53 Cong. Rec. 8077).

The language of the Committee Report and the statements of the Committee members above quoted carry conviction that it was the purpose of the Shipping Act to set up the rights and remedies which it provided as the sole substantive and adjective provisions of our statutory law affecting competition among common carriers by water in our foreign commerce.

(d) It was not the legislative purpose to render the contract system illegal *per se*.

We have observed that the cornerstone of the Attorney General's argument with respect to the essential illegality of the contract system is his contention that Section 15 of the Shipping Act (46 U. S. C. § 814) does not authorize conferences to enter into

agreements which prevent or destroy competition with non-conference lines. His argument is that only competition among the conference lines may be affected by agreements under Section 15. The legislative history of the Act demonstrates that this argument is ill-founded.

The Alexander Committee's recommendations (4 Alexander Rep. 415) make it clear that many of the conferences at that time had adopted agreements which had as their purpose meeting the competition of non-conference lines:

> "The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) *meeting the competition of non-conference lines.* Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report." (Italics supplied.)

Thus the Committee recognized that of the eighty conference agreements then in existence, at least some contained provisions for "meeting the competition of non-conference lines." Yet, the legislation recom-

mended by the Committee and enacted into law, provides (Section 15; 46 U. S. C. § 814):

> "Agreements existing at the time of the organization of the * * * [Board] shall be lawful until disapproved by the * * * [Board]. * * *"

Thus the chief reliance of the Attorney General is proved fallacious.

The legislative history of Section 14 (46 U. S. C. § 812) also supports petitioners' position that contract systems are not illegal *per se*:

The Committee found that conferences had considered it necessary, in the avoidance of cutthroat competition and rate wars, to adopt certain devices aimed at non-conference competition. The measures thus adopted were of three kinds. First, there was the deferred rebate system. The Alexander Committee described the operation of this system and laid especial emphasis on the element of deferment whereby the shipper was kept under constant obligation to the conference lines (4 Alexander Rep. 287). Secondly, the Committee discussed the implement of the fighting ship which the Committee defined with exceptional preciseness (4 Alexander Rep. 289).

Thirdly, the Alexander Committee considered the contract system which it described in the following language (4 Alexander Rep. 290):

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The

rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, *i. e.* are willing at all times to contract with all shippers on the same terms."

In submitting its Report to the House of Representatives, the Alexander Committee sent with it certain recommendations. The sixth recommendation is as follows (4 Alexander Rep. 421):

"(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

If it may be contended that the language of Section 14 of the Shipping Act is at all ambiguous in that it may be interpreted so as to declare the contract system illegal *per se*, a consideration of the foregoing portions of the Alexander Committee Report, we submit, resolves the doubt in petitioners' favor. The Report exhibits a keen appreciation of the character of the deferred rebate, the fighting ship, and the contract system. The Committee specifically recommended the abolition of the fighting ship and the deferred rebate which it had defined with exceptional preciseness. Its Report is as silent with respect to the abolition of the contract system as is the statute which was enacted as a result of the Committee's labors.

We submit that the reason for the Committee action is obvious. We have noted that the Committee recog-

nized the inflexible unit of transportation in water commerce, *i.e.*, the ship. From that axiom of ocean transportation, it follows that the earning of compensatory revenues depends on the ability of the steamship owner *to fill his ship* at reasonable rates. A corollary of this axiom is that, if the major portion of the lines in the trade maintain stable rates, and a non-conference competitor enters the trade and offers rates which are fractionally lower than the conference rates, shippers will be impelled, by fear of similar action by competitors, to make their shipments, to the extent possible, by the non-conference line.[13] The non-conference line will thus be able to fill its ships and earn compensatory revenues at the lower rates, whereas, the conference lines, with only partially filled holds, will experience continuing losses. Since the non-conference line can indefinitely expand its fleet by resorting to the world charter market, the conference lines, unless they be permitted to employ a rate stabilizing instrumentality such as the contract system, would have no alternative but to meet rate cut with rate cut and a rate war ending with the dissolution of the conference would be the inevitable result.

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[13] The point was well put in the Reports from Commissioners, Inspectors, and Others (more fully described in footnote at p. 76, *supra*) at p. 49, as follows:

> "163. In this consideration, we think, the answer is to be found to the argument which has been advanced that, if the advantages above referred to are really to the benefit of trade, they will be supplied under the ordinary operations of the law of supply and demand. We are of opinion that, if shipowners were forbidden to use any means to secure custom other than the excellence of their service, the maintenance of a service offering these advantages would become impracticable. Shippers, even while admitting that it would be to their advantage collectively to ship only by the Conference Lines, would individually ship by tramps whenever a suitable opportunity offered. Indeed, the competition of their fellows would compel them to do so. And the loss of revenue thus occasioned to the regular Lines would render it necessary for them to choose between abandoning their services or conducting them in a very different way."

The obviously conscious decision of the Alexander Committee to leave to the conferences the device of the contract system, is undoubtedly to be explained upon the premise stated in the footnote to *Swayne & Hoyt*, 300 U. S. 297, 307 (1937):

> "The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates', since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period."

FOURTH POINT.

THE COURT BELOW ERRED IN RULING THAT THE UNITED STATES IS WITHOUT REMEDY UNLESS ONE IS ACCORDED UNDER THE SHERMAN ACT.

It follows from what has been said that the Congress has set up the Board as the representative of the United States to bring about conformity by ocean carriers to the provisions of the Shipping Act. Section 22 of the Shipping Act (46 U. S. C. § 821) empowers the Board, without prior complaint from anyone, to investigate violations of the Act and to enter orders bringing such violations to an end. The Board has frequently exercised this power, *e. g.*, *Storage of Import Property*, 1 U. S. M. C. 676 (1937); *Free Time and Demurrage Charges at New York*, 3 U. S. M. C. 89 (1948), in which the Board ordered the carriers to correct abuses in the allowance of free time on import cargo and to adopt proper regulations; and *Rates, Charges and Practices of Carriers*, 2 U. S. M. C. 426 (1940), where the Board entered a cease and desist order to prohibit the carriers from permitting shippers to obtain unduly low rates by misclassifications of cargo.

The Government, therefore, does have a remedy, other than a hypothetical one under the Sherman Act, and the public welfare is thus completely protected even if the Attorney General were not empowered to initiate proceedings before the Board.

The Shipping Act itself contains evidence that it was the legislative purpose that the Board should have complete charge of the enforcement of the Shipping Act and thereby effectuate the great objects for the accomplishment of which the Act was designed.

The Act does recognize a function to be performed by the Attorney General. Thus under Sections 29 and 31 of the Act (46 U. S. C. §§ 828 and 830), in case of the violation of any order of the Board, other than one for the payment of money, and in suits brought to enforce, suspend, or set aside Board orders, authority is vested in the Attorney General primarily, to protect and to seek enforcement of the orders of the Board. It thus appears to be the legislative pattern that, so far as suit in court is concerned, the Attorney General shall have no necessary function and the Courts shall have no jurisdiction until after the Board's order shall have been entered.

However, we strongly urge that the United States, represented by the Attorney General, may initiate proceedings before the Board. Section 22 of the Shipping Act (46 U. S. C. § 821) provides that "Any person" may file a sworn complaint and thereby initiate a proceeding. The term "person", of course, has been variously construed in various statutes and in various contexts. Admittedly, the definition in Section 1 of the Shipping Act (46 U. S. C. § 801) does not specifically include a sovereign. That definition is as follows:

> "The term 'person' includes corporations, partnerships, and associations, existing under or au-

thorized by the laws of the United States, or any State, Territory, District, or Possession thereof, or of any foreign country."

Nonetheless, the term "other person subject to this Act" (46 U. S. C. §801) has been interpreted as being sufficiently broad to include the State of California which was engaged in the business of furnishing wharfage and dock facilities. *California* v. *United States*, 320 U. S. 577 (1944).

We submit that the criterion enunciated in *United States* v. *Cooper Corporation*, 312 U. S. 600 (1941), should here result in bringing the United States, represented by the Attorney General, within the definition of "person" as used in Section 22 of the Act. It is true that in *Cooper Corporation* the Court held that the United States did not fall within a definition of the word "person" which does not differ materially from the definition in the Shipping Act. However, the criterion put forward in that case, we submit, requires a different result as applied to Section 22 of the Shipping Act. The pertinent language of the Court in *Cooper Corporation* (*id.* at 604-605) is as follows:

> "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."
>
> * * * * *
>
> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory

language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

Cooper Corporation was an action by the United States to recover treble damages for violation of the Sherman Act. Later, in *Georgia* v. *Evans*, 316 U. S. 159 (1942), *Cooper Corporation* was explained on the ground that, in the enactment of the Sherman Act, the United States had given itself three potent weapons, *i. e.*, criminal prosecution, injunction, and forfeiture of property, and, hence, it was not to be supposed that it intended, by implication, to grant to itself the fourth remedy of treble damages. That such is the explanation of *Cooper Corporation* appears from the following language (316 U. S. at 161):

"The only question in the *Cooper* case was 'whether, by the use of the phrase 'any person,' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.' 312 U. S. at 604. Emphasizing that the United States had chosen for itself three potent weapons for enforcing the Act—namely, criminal prosecution under §§ 1, 2, and 3, injunction under § 4, and seizure of property under § 6—, the Court concluded that Congress did not also give the United States the remedy of a civil action for damages. This interpretation was drawn from the structure of the Act, its legislative history, the practice under it, and past judicial expressions. It was not held that the word 'person,' abstractly considered, could not include a governmental body. Whether the word 'person' or 'corpora-

tion' includes a State or the United States depends upon its legislative environment."

In holding that the term "person", as used in the Sherman Act, was broad enough to include a state within its scope, this Court pointed out (*id.* at 162):

> "If the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.
>
> "The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. We have already held that such a remedy is afforded to a subdivision of the State, a municipality, which purchases pipes for use in constructing a waterworks system. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390. Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State."

The essence of *Georgia* v. *Evans*, we take it, is in the sentence:

> "If the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for

injuries resulting from practices outlawed by that Act."

It is not to be ignored that the Congress itself has in important legislation referred to the United States as a "person". Thus, in the proviso of Section 16 of the Clayton Act (15 U. S. C. § 26), we find:

> "*Provided,* That nothing contained in Sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle *any person, firm, corporation, or association, except the United States,* to bring suit in equity for injunctive relief against any common carrier subject to the provisions of Chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." (Italics supplied.)

It therefore appears that there is no hard and fast rule by which it can be ascertained whether the term "person", as used in the statute, does or does not include the sovereign. The logic of *Cooper Corporation* and *Evans* would seem to require the determination here that the United States, represented by the Attorney General, is a "person" within the intendment of Section 22.

The legislative history of the Shipping Act supports our contention. When the Bill which, with modifications, later became the Shipping Act, was before the House of Representatives, a colloquy took place between Representative Saunders, of Virgina, who was a member of the Alexander Committee and who also served as a presiding officer of the Democratic Caucus, convened to obtain passage of the Bill (53 Cong. Rec. 8082), and Representative Bennet, of New York, from which it appears that it was the purpose of the sponsors of the measure to give to the term "person" the broadest possible scope. Representative Bennet had objected to the inclusion in the

bill of a definition of the term "person", because he feared that in designating certain entities as included therein, other entities would thereby be excluded. To this Representative Saunders answered (53 Cong. Rec. 8277):

> "Can the gentleman think of anybody who ought to be brought in that this does not bring in? If he does, let him tell us and we will bring him in."

Additional congressional discussions of the term "person" show that the term was intended to have the broadest possible scope (53 Cong. Rec. 8276-8278).

We submit that the instant case requires that the Government be included within the meaning of the term "person". If the Court should determine that the Government does not have an adequate remedy in the exercise of the powers granted to the Board under Section 22 of the Shipping Act, then we submit that any construction other than the one for which we contend would contort the symmetry of the Act. It would result in the unusual spectacle of legislation which, when invoked by a mere citizen, would be administered by the specialized body created by the Congress for that very purpose yet which, when invoked by the sovereign, would require administration by a court acting under the mandate of the Sherman Act whose purpose is antipodal to that of the Shipping Act. In such case, the Court, acting under a statute whose mandate requires the enforcing of unlimited competition, would be required to weigh in the balance such concepts as necessity for stability of rates and services, considerations with which the Sherman Act has no concern and for the determination of which the judicial process is without aptitude.

Whether or not the Attorney General has authority to initiate proceedings before the Board, the Government has an adequate legal remedy and, if that be the key to the controversy, a reversal is required.

FIFTH POINT.

THE FREIGHT CONTRACT BETWEEN THE CONFERENCE AND THE SHIPPER IS NOT SUBJECT TO ATTACK UNDER THE SHERMAN ACT.

The Attorney General argued below that the contract between the Conference and the shipper is a violation of the Sherman Act, for the reason that Section 15 of the Shipping Act (46 U. S. C. § 814) authorizes the Board to approve only agreements among common carriers or among other persons subject to the Act, or among parties in both such classes. There are two answers to this contention.

First, the complaint is based upon an alleged combination and conspiracy among the defendant lines, the essence of which is the dual rate system supported by exclusive patronage contracts with a great number of shippers. The result of this conspiracy is alleged to be the exclusion of other carriers from the outbound Far East trade, and the restraint of trade, and monopoly. The attack is not made, if indeed an attack could be made, upon the contract with an individual shipper as constituting a violation of the Sherman Act.

Secondly, the argument of the Attorney General on this point proceeds upon the proposition that the Alexander Committee had recommended that navigation companies, and the like, be required to file with a regulatory agency all contracts with shippers. The Congress did not accept this recommendation. From this circumstance the Attorney General deduces that the Congress intended that conferences acting under agreements actually approved, might not legally enter into contracts with shippers of the type exemplified by Exhibit B attached to the complaint. From this premise he concludes that each such contract with each shipper, not having been approved, is not pro-

tected by the provisions of Section 15 from attack under the Sherman Act.

We submit that the rejection by Congress of the Committee's recommendation is rather to be considered as a practical recognition by the Congress that the filing of thousands of individual contracts, identical except for the shipper's name, could serve no useful purpose. Such contracts, to be lawful, cannot vary in their terms from shipper to shipper. All needed regulation of such contracts could be secured if the regulatory body should be in a position to scrutinize *the forms of contracts uniformly employed* for all shippers, and either require that such forms be changed, as was done in *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948) and *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939), or permit them to stand.

The fallacy of the Attorney General's argument under this head, moreover, becomes manifest in the light of the following language of Section 15 of the Shipping Act (46 U. S. C. § 814):

> "All agreements, modifications, or cancellations made after the organization of the * * * [Board] shall be lawful only when and as long as approved by the * * * [Board], and before approval or after disapproval it shall be unlawful *to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.*" (Italics supplied.)

If this language means anything, it means that, after an agreement shall have been approved and before it shall have been disapproved, it shall be lawful to carry out the agreement in whole or in part, directly or indirectly. The conference agreements are meaningless unless the carriers may take the measures which the agreements contemplate without

seeking a new approval each time action thereunder is to be taken.

An analogy may be found in *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis,* 288 U. S. 469, 476 (1933). The situation there was the reverse of that here involved. Here, the Attorney General would attack acts done pursuant to an agreement which had been legalized by the Board. There, the attack was made upon an agreement all the acts in the performance of which were subject to the jurisdiction of the Interstate Commerce Commission. The Court's language is most appropriate here:

> "True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission. * * *"

An injunction to prevent performance of a legal agreement would be a paradox, indeed.

As we understand the opinion of the District Court, the Attorney General's argument referred to in this point was not accepted by it and we submit that, in this regard, the Court below was correct in its ruling.

SIXTH POINT.

THE INTERPRETATION OF THE SHIPPING ACT URGED BY PETITIONERS WOULD NOT RENDER THAT STATUTE UNCONSTITUTIONAL.

The Attorney General may here contend that the Shipping Act should not be interpreted as urged by petitioners, for the reason that, so interpreted, it would be unconstitutional in accordance with the principles laid down in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537 (1935). That argument proceeds upon the hypothesis that a conference holds the power, by the institution of a contract system, either to exclude an outside line from the trade or to compel it to join the conference. So the argument is that by petitioners' interpretation, the group of private carriers would be vested by the Congress with the right to issue or withhold a certificate of convenience and necessity.

Even conceding, *arguendo*, that the contract system does have the farreaching economic effect stated in the hypothesis, still *Schechter* is not here applicable. In the Statute which *Schechter* declared unconstitutional, the Congress had laid down no standards by which any governmental agency could supervise or negate actions of the parties operating under the Code, whereas, the Shipping Act set up the Board as the controlling agency and abounds with specific directions to the Board to govern its regulatory duties.

Schechter involved a code adopted under Section 3 of the National Industrial Recovery Act (48 Stat. 195, 196). Under it, the Live Poultry Code had legislated in great detail on a number of subjects with respect to which the Act contained no enabling provisions or regulatory directions. For instance, in the sections of the Code having to do with labor, the Code specified the hours of work, the minimum

wages to be paid, the minimum number of employees and the minimum age of employees. All of this private legislation had been attempted under a statute which set up as substantially the only guidepost the maintenance of "fair competition". There was no agency to regulate the Code operations or to set them aside if inconsistent with the congressionally adopted standard. This Court (295 U.S. at 539-540) distinguished between the status of the poultry merchants under the Code on the one hand and the status of carriers operating under the Interstate Commerce Act, and radio broadcasting companies operating under the Radio Act of 1927 (44 Stat. 1162, 45 Stat. 373) on the other hand. Thereupon, the essence of the matter was put thus at pages 541-542:

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

A case that comes much closer to ours is *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940), which involved the constitutionality of the Bituminous

Coal Act of 1937 (50 Stat. 75). Much that was said there is applicable here. The Court, at page 395, described the conditions which the Act was adopted to correct:

> "Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims."

This language bears striking analogy to that of the Alexander Committee in describing an unregulated steamship industry (*supra*, pp. 79-80).

With respect to the power of Congress to pass such an Act, the Court said at pp. 395-396:

> "To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could not be taken without plain disregard of the Constitution."

And again at p. 396:

> "Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions, a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of *laissez-faire*. It is not powerless to take steps in mitigation of what in its

judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative."

With respect to the legality or illegality of the delegation of legislative authority by the Congress, the Court said at p. 399:

> "Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin* v. *Wallace, supra,* and cases cited."

In our Second Point (pp. 48 to 72, *supra*), we have detailed the specific directions which the Congress has given not alone to the Board but to the industry, and the inhibitions which had been laid upon both. They adequately distinguish regulation under the Shipping Act from the procedure adopted under the National Industrial Recovery Act. The following cases support the distinction which we have here made:

Currin v. *Wallace,* 306 U. S. 1, 15-16 (1939);
New York Central Securities Co. v. *United States,* 287 U. S. 12, 25-26 (1932); and
United States v. *Rock Royal Co-op,* 307 U. S. 533, 577-578 (1939).

SEVENTH POINT.

THE CASES RELIED UPON BY THE ATTORNEY GENERAL.

Under this head we shall discuss the cases upon which the Attorney General chiefly relied below.

The Attorney General cited *United States* v. *Borden Co.*, 308 U. S. 188 (1939), in support of his proposition that the United States may sue under the Sherman Act when private individuals may not so sue; although the Court below cited *Borden* for a more limited proposition, *i. e.*, that the Shipping Act affords the petitioners a defense but does not curtail the jurisdiction of the Court under Section 4 of the Sherman Act (94 F. Supp. at 903, R. 100).

In *Borden*, an indictment had been found against dairy farmers, distributors of milk, leaders of a union of milk truck drivers, and officials of the City of Chicago, charging that the defendants had conspired to fix the price to be paid to members of an association of milk producers for milk to be distributed in the City of Chicago.

The District Court sustained an attack upon the indictment on the ground that under the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. §§ 671-674) and its predecessor Acts, the Cooperative Marketing Act of July 2, 1926 (7 U. S. C. §§ 451-457), and the Agricultural Adjustment Act of 1933 (7 U. S. C. §§ 601-659), as well as under the Capper-Volstead Act (7 U. S. C. §§ 291-292), the questions presented in the indictment were required in the first instance to be passed upon by the Secretary of Agriculture under an application of the primary jurisdiction rule.

This Court disapproved of the ruling of the District Court so far as concerns the Capper-Volstead Act, on the ground that the latter Act applied only to

farmers and did not profess, under any circumstances, to give validity to combinations among farmers, distributors, labor union officials and city officials. The Court ruled that, here, to use the expression adopted in *Terminal Warehouse,* 297 U. S. 500, 515-516 (1936), was "a circumambient conspiracy". In this connection the court said (308 U. S. at 204-205):

> "The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise. *In this instance, the conspiracy charged is* not that of merely forming a collective association of producers to market their products but *a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area,* and thus in effect, as the indictment is construed by the court below, 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago.' 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act." (Italics supplied.)

This Court disposed of the contention that the application of the primary jurisdiction rule was required by the provisions of the Agricultural Marketing Agreement Act and its predecessor Acts upon the

ground that those Acts, while validating agreements among farmers and handlers of agricultural products of a specified type if the Secretary of Agriculture should become a party thereto (the Secretary had not become a party to the agreement in question), did not go further and condemn as illegal or provide a punishment for agreements which had not thus been validated. In this respect, the Agricultural Marketing Agreement Act and its predecessor Acts differed distinguishably and sharply from the Shipping Act. Section 15 of the Shipping Act (46 U. S. C. § 814), while validating agreements of the specified types which should receive the approval of the Board, also condemns all such agreements which are not so approved and stamps them as illegal and provides the punishment therefor. That this is the distinction which this Court had in mind appears from the following language in *Borden* (*id.* at 199-200):

> "That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

The Shipping Act not only specifies what agreements are valid but does impinge upon the prohibitions and penalties of the Sherman Act by specifically condemning private action in entering into agreements which have not been approved by the Board. There

is no suggestion in *Borden* that the administrative remedy was dispensed with because the United States rather than a private person was the plaintiff.

The Attorney General also relied on *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196 (1945), although as we understand its opinion, the Court below did not accept this application of that case. *Alkali* involved charges of violation of the Sherman Act by parties to an association organized under the Webb-Pomerene Act (15 U. S. C. §§ 61-65). This is the Act which authorizes American exporters to associate for purposes of acting cooperatively, with the limitation, among others, that such association shall not take any action which might result in the restraint or monopolization of interstate trade or which might tend to exclude other American merchants from the export trade. The statute does not itself prohibit or render unlawful any restraint or monopolization of interstate or foreign commerce. The Federal Trade Commission is given power to investigate any alleged violation of the law and, if it should find a violation and non-compliance with its subsequent recommendations, to refer its finding to the Attorney General of the United States for proper action (15 U. S. C. § 65). It has, however, no power to hear and determine questions of violation, or to issue orders imposing penalties or requiring cessation of the violations. The only remedies were under the Sherman Act. Monopolization or restraint of interstate trade continued to constitute a violation only of the Sherman Act and not of the Webb-Pomerene Act. That these were the points upon which this Court rejected defendants' contention that prior resort to the Federal Trade Commission was a prerequisite to antitrust action is amply substantiated by the following language (325 U. S. at 206):

> "In determining whether the Webb-Pomerene Act curtailed the then existing authority of the

United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. *But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.*" (Italics supplied.)

The Court then discussed the argument that Congress could not have contemplated concurrent jurisdiction of the Federal Trade Commission and the courts. It thereupon proceeded to say, *id.* at 208:

"This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes, which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. *But the Commission, under the Webb-Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General.* Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; *the violations here alleged are not violations of the Webb-Pomerene*

Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States." (Italics supplied.)

In neither *Borden* nor *Alkali* did this Court intimate that the administrative remedy could be circumvented merely because the Attorney General, on behalf of the United States had instituted an antitrust suit.

The Attorney General cited *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U. S. 156 (1922). It cannot be overemphasized that *Keogh was a suit at law for treble damages (and not a suit for an injunction)* instituted by a shipper against a number of railroads and their officers, alleging that the defendants had conspired to fix rates and charges. The following quotations demonstrate the inapplicability of the case (*id.* at 161-162):

"All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angles Switching* case, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, *may recover damages under § 7* because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. * * *" (Italics supplied.)

and at p. 163:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property'. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier * * * And they are not affected by the tort of a third party. * * * This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. *If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.* It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. * * *" (Italics supplied.)

Thus, Keogh was denied the right to recover *treble damages* in order to avoid giving him a preference. The Court contrasted this right with the remedies which the Government might have because of the acts complained of:

> "the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6."

Clearly, Keogh was in no position to prosecute criminal proceedings or to sue for forfeiture. *The*

fact is that he did not sue for an injunction, nor did this Court consider even by way of dictum what his right would have been had he sued for an injunction. Had he sued for an injunction, his right to do so would have been sustained, as is demonstrated by *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439 (1945). Therefore both the private litigant and the Government had equal right to equitable relief.

Our research has disclosed no case in which any court has decided that in any situation analogous to *United States Navigation* different rules govern, dependent upon whether the plaintiff is the United States or a private party.

CONCLUSION.

FOR THE REASONS STATED, IT IS RESPECTFULLY SUBMITTED THAT THE ORDER OF THE COURT BELOW SHOULD BE REVERSED TO THE EXTENT TO WHICH REVIEW OF SUCH ORDER WAS BROUGHT BEFORE THIS COURT BY THE GRANT OF THE WRIT OF CERTIORARI.

Respectfully submitted,

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New York, New York
January 7, 1952

APPENDIX.

A. Selected provisions of the Sherman Act (extracted from Title 15, U. S. C. A.).

Sec. 1. (15 U. S. C. sec. 1.) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. (15 U. S. C. sec. 2.) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * *

Sec. 4. (15 U. S. C. sec. 4.) The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restrain-

ing order or prohibition as shall be deemed just in the premises.

B. Selected provision of the Clayton Act (extracted from Title 15, U. S. C. A.).

Sec. 16. (15 U. S. C. sec. 26.) Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

C. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.).

Sec. 1. (46 U. S. C. sec. 801.) When used in this chapter: The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

* * * *

Sec. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper

has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Sec. 14a. (46 U. S. C. sec. 813.) The commission [Board] upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 812 of this title, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal

terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the commission [Board] determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the commission [Board] shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [Board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters

from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [Board] shall be lawful until disapproved by the commission [Board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [Board].

All agreements, modifications, or cancellations made after the organization of the commission [Board] shall be lawful only when and as long as approved by the commission [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates and provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U. S. C. sec. 815.) It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this chapter [Act], either alone or in conjunction with any other person, directly or indirectly——

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality,

or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter [Act].

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17. (46 U. S. C. sec. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission [Board] finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter [Act] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission [Board] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Sec. 18. (46 U. S. C. sec. 817.) Every common carrier by water in interstate commerce shall es-

tablish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the commission [Board] and keep open to public inspection, in the form and manner and within the time prescribed by the commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the commission [Board] and after ten days' public notice in the form and manner prescribed by the commission [Board], stating the increase proposed to be made; but the commission [Board] for good cause shown may waive such notice.

Whenever the commission [Board] finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Sec. 19. (46 U. S. C. sec. 818.) Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise

injuring a competitive carrier by water, it shall not increase such rates unless after hearing the commission [Board] finds that such proposed increase rests upon changed conditions other than the elimination of said competition.

Sec. 20. (46 U. S. C. sec. 819.) It shall be unlawful for any common carrier by water or other person subject to this chapter [Act], or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this chapter [Act] for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this chapter [Act] shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Sec. 21. (46 U. S. C. sec. 820). The commission [Board] may require any common carrier by water, or other person subject to this chapter [Act], or any officer, receiver, trustee, lessee, agent, or employee

thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board [sic] so requires, and shall be furnished in the form and within the time prescribed by the commission [Board]. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Sec. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [Board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [Board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [Board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [Board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [Board], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [Board], upon its own motion, may in like manner and, except as to orders for the

payment of money, with the same powers, investigate any violation of this chapter [Act].

Sec. 23. (46 U. S. C. sec. 822.) Orders of the commission [Board] relating to any violation of this chapter [Act] shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission [Federal Maritime Board], other than for the payment of money, made under this chapter [Act], as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the commission [Board], or be suspended or set aside by a court of competent jurisdiction.

Sec. 24. (46 U. S. C. sec. 823.) The commission [Board] shall enter of record a written report of every investigation made under this chapter [Act] in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The commission [Board] may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, District, and possessions thereof.

Sec. 25. (46 U. S. C. sec. 824.) The commission [Board] may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the commission [Board], operate as a stay of such order.

Appendix.

Sec. 26. (46 U. S. C. sec. 825.) The commission [Board] shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the action of any foreign government with respect to the privileges afforded and burdens imposed upon vessels of the United States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign government operate in such a manner that vessels of the United States are not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, either in trade to or from the ports of such foreign country or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the commission [Board] to report the results of its investigation to the President with its recommendations and the President is authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by special message, if deemed important in the public interest, in order that proper action may be taken thereon.

Sec. 27. (46 U. S. C. sec. 826.) For the purpose of investigating alleged violations of this chapter [Act], the commission [Board] may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the commission [Board], and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the commission [Board], by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting

under the direction of the commission [Board] and witnesses shall, unless employees of the commission [Board], be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the commission [Board], be enforced as are orders of the commission [Board] other than for the payment of money.

Sec. 28. (46 U. S. C. sec. 827.) No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the commission [Board] or of any court in any proceeding based upon or growing out of any alleged violation of this chapter [Act]; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 29. (46 U. S. C. sec. 828.) In case of violation of any order of the commission [Board], other than an order for the payment of money, the commission [Board], or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Sec. 30. (46 U. S. C. sec. 829.) In case of violation of any order of the commission [Board] for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United

States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission [Board] in the premises.

In the district court the findings and order of the commission [Board] shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the commission [Board] has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Sec. 31. (46 U. S. C. sec. 830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Sec. 32. (46 U. S. C. sec. 831.) Whoever violates any provision of this chapter [Act], except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed $5,000.